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Holsum de Puerto Rico, Inc. and Carlos Martinez Toro and United Auto Workers International Union, Local 2429. Cases 24–CA–9408, 24–CA–9487, and 24–CA–9589

May 24, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 10, 2004, Administrative Law Judge George Aleman issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt the recommended Order⁴ as modified.

¹ The General Counsel contends that certain of the Respondent's exceptions should be disregarded. The judge found, inter alia, that the Respondent violated Sec. 8(a)(1) of the Act by (a) engaging in surveillance of employees' protected activities; (b) creating the impression of surveillance of employees' protected activities; (c) threatening employee Ramon Cruz with unspecified adverse consequences; (d) coercively interrogating employees Cruz, David Montalvo, and Rolando Rodriguez; and (e) coercively interrogating employee Jose Santiago in May 2003. The General Counsel contends that the Respondent's exceptions to the foregoing findings do not meet the minimum requirements of Sec. 102.46(b) of the Board's Rules and Regulations. We agree. The Respondent merely recites the findings excepted to and cites to the judge's decision without stating, either in its exceptions or its supporting brief, on what grounds the purportedly erroneous findings should be overturned. Under these circumstances, we find, in accordance with Sec. 102.46(b)(2), that the Respondent's exceptions to the foregoing unfair labor practice findings should be disregarded. See *Oak Tree Mazda*, 334 NLRB 110 fn. 1 (2001).

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless a clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent discharged employee Jose Torres in violation of Sec. 8(a)(3) of the Act, we find it unnecessary to rely on his finding that letters written by the Respondent's president, Ramon Calderon, expressing opposition to unionization show evidence of animus. The Respondent's antiunion animus is amply demonstrated by its numerous violations of Sec. 8(a)(1).

In September 2002, Santiago and Torres were asked by their supervisors, in separate encounters, whether they had received Calderon's letter and what they thought about it. In adopting the judge's finding that these questionings, under the totality of the circumstances, constituted coercive interrogations in violation of Sec. 8(a)(1), Chairman

For the reasons stated by the judge except as modified herein, we adopt the judge's finding that the Respondent's discharge of Santiago violated Section 8(a)(3). Santiago was discharged following an incident in which he took several cups of coffee from a company dispenser—the coffee was free to employees—and gave them to individuals who were distributing union literature outside of the Respondent's facility. At the interview that culminated in Santiago's discharge, Supervisor J.P. Velez asked Santiago why he had given coffee to nonemployees who were distributing union propaganda against the Company. Santiago was told to prepare a written report about the incident, but he declined to do so. Santiago was then terminated for "removing company property without authorization," according to the personnel action form documenting his discharge. In finding that Santiago's discharge violated Section 8(a)(3), the judge, inter alia, cited several grounds for finding the reason stated on Santiago's personnel action form pretextual. In adopting the judge's pretext finding, we rely solely on the question Velez posed at Santiago's discharge interview, which demonstrated that the real reason Santiago was discharged was that, in Velez' words, he gave the coffee to persons who were distributing "union propaganda against the Company."⁵

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusion of Law 3.

"3. By engaging in surveillance of its employees' protected activities, creating the impression that it was keeping its employees' union activities under surveillance, coercively interrogating employees about their union activities, and threatening employees with discharge and other unspecified adverse consequences if they supported the Union, the Respondent violated Section 8(a)(1) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as

Battista and Member Schaumber do not pass on whether asking the employees whether they had received Calderon's letter, without more, would have constituted unlawful interrogation.

³ We will amend the judge's third conclusion of law to correspond to the 8(a)(1) violations found.

⁴ The General Counsel requests that the judge's recommended Order be modified to require the Respondent to post notices in both English and Spanish. As bilingual notices are customary in Region 24, we shall modify the judge's recommended Order accordingly. *Hospital Del Maestro*, 323 NLRB 93 fn. 2 (1997).

⁵ Chairman Battista observes that Santiago could have been lawfully disciplined for refusing the order to prepare a written report of the coffee incident, but the Respondent never raised insubordination as a reason for discharging Santiago.

modified below and orders that the Respondent, Holsum De Puerto Rico, Inc., Toa Baja, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(e).

“(e) Within 14 days after service by the Region, post at its facility in Toa Baja, Puerto Rico, in both the English and Spanish languages, copies of the attached notice marked “Appendix.”⁶ Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 25, 2002.”

Dated, Washington, D.C. May 24, 2005

Robert J. Battista,	Chairman
Wilma B. Liebman,	Member
Peter C. Schaumber,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Ana Ramos & Jose Ortiz, Esqs., for the General Counsel.
Howard S. Linzy, Esq., for the Respondent.
Miguel Simonet Sierra, Esq., for the Charging Party.

DECISION

GEORGE ALEMÁN, Administrative Law Judge. This case was tried in Hato Rey, Puerto Rico, on various dates between November 17, 2003 and January 13, 2004. The charges, and amendments thereto, were filed between October 11, 2002 and

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

June 18, 2003.¹ A consolidated complaint issued on October 16, 2003.

The complaint alleges that Holsum de Puerto Rico, Inc. (Respondent), has, in various manner, violated Section 8(a)(1) and (3) of the Act. The Respondent, by answer dated October 24, 2003, denies engaging in any unlawful conduct. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by counsel for the General Counsel, the Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Puerto Rico corporation with an office and place of business in Toa Baja, Puerto Rico, where it is engaged in the business of processing, sale at the retail and wholesale level, and distribution of bread and other bakery products. During the year preceding issuance of the complaint, a representative period, the Respondent, in the course and conduct of its business operation, purchased and caused to be shipped to its Toa Baja facility goods and materials valued in excess of \$50,000, which goods and materials were transported and delivered to its plant directly from points and places outside the Commonwealth of Puerto Rico. On these admitted facts, I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The allegations

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by engaging in unlawful surveillance of its employees activities; creating the impression that it was engaging in such surveillance; threatening employees with unspecified reprisals and loss of jobs for engaging in such activities; and unlawfully interrogating employees regarding their union activities. It further alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by unlawfully discharging employees José Torres Figueroa (Torres) and José Santiago Maldonado (Santiago) for engaging in union or other protected concerted activity.²

B. Factual Background

The Respondent, as noted, is in the business of processing and selling baked products throughout Puerto Rico. In carrying

¹ The charge in Case 24–CA–9589 was filed by United Automobile, Aerospace, and Agricultural Implement Workers of America International Union, Local 2429, AFL–CIO (the Union).

² See, Transcript Volume 1, p. 7. Reference to testimonial evidence is identified herein by transcript (Tr.) page number; exhibits are identified either as “GCX” for a General Counsel exhibit, or “RX,” for a Respondent exhibit, followed by the exhibit number. Finally, reference to arguments made by the parties in their respective briefs will be identified either as “GCB” for the General Counsel’s brief, “RB” for the Respondent’s brief, and “CP” for the Charging Party’s brief, followed by the brief page number(s).

out this function, it employs numerous categories of employees, including salespersons, whose function it is to deliver Respondent's products in company-owned trucks or vehicles to various retail establishments throughout Puerto Rico. Alleged discriminatees Torres and Santiago both were employed as salespersons at the time of their discharge.

The record reflects that during the summer of 2002, certain of the Respondent's salespersons took an interest in obtaining some form of representation. Thus, on July 24, 2002, and 1 week later on July 30, 2002, a group of salespersons held meetings to discuss job-related problems they were having and to determine how best to address them with management. According to Santiago, he, Torres, and four other employees took part in organizing that first July 24 meeting which was held at a public beach in the town of Dorado (Tr. 430). Santiago testified, without contradiction, that he personally notified a majority of the salespersons of the meeting and informed them during those conversations that the purpose of the meeting was to discuss work-related issues that were troubling employees. Torres testified, also without contradiction, that it was Santiago who scheduled the meeting for July 24, and that he assisted Santiago in contacting other employees. Torres recalls having raised at the July 24 meeting an issue concerning the manner in which merchandise that was to be delivered to customers was being distributed to the salespersons. The July 24 meeting, according to Torres, turned out to be a fairly disorganized event, prompting employees in attendance to agree to a second meeting 1 week later, on July 30. Santiago, Torres, and approximately 40 other salespersons did in fact meet on July 30, at a Karate school in the town of Vega Alta where various work-related issues, including wages, were discussed among those present.

Ramon Cruz was employed by the Respondent as a salesperson for some 12 years before voluntarily resigning in August 2002. Cruz attended both the July 24 and 30, 2002 meetings. He testified, without contradiction, that the day after the July 24 meeting, his immediate supervisor, Antonio DeJesus, rode along with him in his truck as he covered his route.³ Cruz claims that at one point after he had finished servicing K-Mart, one of Respondent's customers, DeJesus remarked to him that he "knew everything about the meeting" and cautioned Cruz "to be careful" because he knew "how Holsum worked." Cruz told DeJesus not to worry because employees were doing things correctly. On cross-examination, Cruz recalled that DeJesus also commented that he knew employees at the meeting were "asking for money." According to Cruz, that was all that was said by DeJesus regarding the previous day's employee meeting (Tr. 26; 41).

Cruz also testified that the day after he attended the second employee meeting on July 30, he was not scheduled to work and was at home sleeping when he received a call from DeJe-

sus. During that conversation, according to Cruz, DeJesus asked him who had attended the meeting the day before and what had been discussed. Cruz declined to respond to DeJesus' questioning, stating that he was trying to get some sleep. The conversation ended at that point. DeJesus did not testify. Cruz' testimony is, therefore, unrebutted. Despite some minor discrepancies in his testimony, from a demeanor standpoint, I found Cruz to be a wholly credible witness. Accordingly, and given the unrefuted nature of his account, I credit Cruz as to what occurred and was said to him by DeJesus following the July 25 and 30, employee meetings.

A third employee meeting was scheduled for the evening of August 13, 2002, at the Karate school. Santiago testified that on the morning of August 13, 2002 as he was doing his route, he stopped at a K-Mart in the town of Guaynabo, Puerto Rico, which was part of his route, where he came across admitted Supervisor Luis Rojas Laracuente (Rojas) who was making changes to or rearranging the shelves where the Respondent's products were generally placed.⁴ Santiago claims that he then began assisting Rojas in shelving the merchandise, and that they engaged in some small talk which eventually turned to the employee meetings held in late July. At one point, according to Santiago, Rojas commented that a salesperson who had been in attendance at both employees meetings had met with management and notified it of everything that had occurred at the meetings. Santiago purportedly responded that employees had a right to meet and organize themselves in order to discuss their work-related problems with management. Santiago claims that Rojas answered that the Respondent would listen to their demands and be willing to negotiate over everything except money. Rojas, Santiago further claimed, told Santiago that this same unnamed salesperson had also identified Santiago and Torres as the organizers, and cautioned Santiago that he and Torres should be careful because "they had them in their sights." (Tr. 411-413) At one point during cross-examination, Santiago also testified that Rojas stated that "the Company had taken action against other employees for this type of thing and that they would do so again." However, when pressed by Respondent's counsel, Santiago admitted that Rojas, in fact, had not made this latter remark, and explained that he (Santiago) was simply expressing the views shared by other Company salespersons. (Tr. 532). The conversation, Santiago claims, then changed to other subjects until they left the K-Mart facility.

Rojas recalls speaking briefly with Santiago on two occasions at the Guaynabo K-Mart sometime in August 2002, although he could not recall the specific date of the conversation. His version differs substantially from Santiago's. He testified that while the Guaynabo K-Mart was not within his supervisory jurisdiction, the Respondent during that period had decided to "set up" all of its K-Mart clients and that he had been assigned

³ Cruz' description of DeJesus as his immediate supervisor was not challenged by the Respondent. According to Cruz' undisputed testimony, DeJesus was the one who evaluated him, audited his routes, authorized his vacations, and to whom he, Cruz, reported in the event of absences. The complaint alleges, and, given Cruz' above undisputed description of DeJesus' duties, I find that DeJesus was at all times material herein a supervisor within the meaning of Section 2(11) of the Act.

⁴ Rojas testified that he has been employed by Holsum for 14 years, e.g., since around 1990, and that he has held the position of sales supervisor for approximately 12 years, or since about 1992. At the time of the hearing, Rojas was in charge of Sales Division No. 5 (Tr. 808-809).

to set up the Guaynabo K-Mart because he lived nearby.⁵ Rojas explained that on the day of his conversations with Santiago in August 2002, he arrived at the Guaynabo K-Mart around 7 a.m. to begin setting up, but that Santiago, the salesperson in charge of the route covering the Guaynabo K-Mart, arrived 20 minutes later. He claims that when Santiago arrived, he instructed him to continue with his route and that he, Rojas, would do the setting. According to Rojas, nothing else was said between the two at that time. The entire conversation, he claims, lasted some 3 to 4 minutes.

As to the second conversation, Rojas testified that Santiago was supposed to return to the Guaynabo K-Mart to fill up the shelves, and that when he did not show up, he called the Company in an effort to contact Santiago. Santiago did show up some 20 minutes later at which point Rojas told him that the setting had been completed but that some of the products to be used in the setting were not available. Santiago, he recalled, told him that the needed products were in his truck and left to retrieve them. When Santiago returned from his truck with the products and began placing them on the shelves, Rojas claims he left the K-Mart store. According to Rojas, that was all that occurred and was said during that second conversation (Tr. 812-813). Santiago's testimony contains no mention of a second conversation occurring with Rojas on August 13.

I credit Rojas's account of what occurred and was said between himself and Santiago on August 13. While Santiago was a generally reliable witness, his embellishment on cross-examination as to what Rojas said to him regarding action that had been taken against other employees for engaging in similar activities, although subsequently recanted, nevertheless casts a cloud over his version of the August 13, conversation with Rojas. I am inclined to agree with counsel for the General Counsel that Rojas' own testimony is not free from doubt. His claim, for example, of never having seen the "union avoidance" policy letter Calderón circulated with his September 5, 2002 memo (see GCX-3) to all sales department employees (discussed below), which would have included Rojas, and their families is simply not credible. Still, I am convinced that Rojas provided a more accurate account of what occurred between himself and Santiago on August 13. Accordingly, Rojas' account is credited.

Santiago testified that after work on August 13, 2002, he left for the scheduled employee meeting and that, as he approached the Vega Alta town plaza, close to where the meeting was to be held, he noticed a group of employees milling around. As he joined the group and waited for other employees to arrive, Santiago and others observed two individuals sitting on a nearby bench across the street watching the group, and, a short while later, saw the same two individuals driving around in a jeep Cherokee taking pictures of, and videotaping, the group's activities. Santiago reported the videotaping incident to Maldonado, the owner of the Karate school, and asked him to call the police. The local police were in fact called and, on arriving soon thereafter, engaged in a discussion with the two individuals. The individuals in question, subsequently identi-

fied as Jorge Figueroa (J. Figueroa) and Eduardo Gonzales (E. Gonzales), were employed by Los Angeles Guardianes, a private detective service which the Respondent admits retaining purportedly for the purpose of "investigat[ing] persons possibly involved in stealing [Company] merchandise" (RB:3). When the police arrived, Santiago phoned Torres to tell him what was going on. Torres testified that on arriving for the meeting, the police were already present. Both Santiago and Torres recall seeing Figueroa and Gonzales being escorted to the local police station. They testified that they also went to the police station to see what would happen. Santiago claims that once there, the police gave him the names of the two individuals in the event employees wished to file a complaint or seek a protective order against J. Figueroa and E. Gonzales.

Angel Figueroa (A. Figueroa) is employed by Los Angeles Guardianes as its head private detective and consultant. He testified that he was verbally contacted by Respondent's security director, Joe Gonzalez, sometime in August 2002, and asked to perform some work for the Respondent at the Vega Alta town plaza on August 13, 2002. According to A. Figueroa, the work Gonzalez asked him to do consisted of an investigation of persons the Respondent believed were stealing Company merchandise. When A. Figueroa told Gonzalez he could not do the work because of a busy schedule, Gonzalez asked him to contact J. Figueroa, who also did investigative work, to see if the latter could perform the work in question. A. Figueroa, however, recommended that Gonzalez call J. Figueroa himself directly and see if he could do the work. Gonzalez apparently did contact J. Figueroa directly for, according to A. Figueroa, he subsequently received a call from J. Figueroa asking if he could do the work for the Respondent under the Los Angeles Guardianes' name as his own private detective's license had expired. Neither Gonzalez nor J. Figueroa was called to testify, leaving unclear precisely what the two may have discussed regarding the nature of the work to be performed. Further, while claiming that J. Figueroa called and asked him if he could perform the work for Holsum under Los Angeles Guardianes, A. Figueroa made no mention in his testimony of J. Figueroa describing to him during that phone call the substance of the conversation he, J. Figueroa, purportedly had with Gonzalez about the nature of the work to be performed. It is clear, however, that A. Figueroa agreed to allow J. Figueroa to do the requested work for the Respondent under his Company's name.

A. Figueroa subsequently submitted a bill to the Respondent for \$2000 representing the work performed by J. Figueroa on August 13, 2002. The amount, A. Figueroa testified, was used to pay J. Figueroa who, in turn, paid a photographer, presumably E. Gonzales, for services rendered, and an attorney retained by J. Figueroa to defend against criminal charges relating to his alleged acts of surveillance. A. Figueroa claims that the investigation J. Figueroa was asked by Gonzalez to conduct on August 13, 2002, at the Vega Alta Plaza was "aborted" because "what we had been hired for [e.g., investigating persons involved in stealing merchandise] was not happening there [e.g., at the Vega Alta town plaza]." A. Figueroa, however, did testify that at least one photograph was taken that day, although he did not know who had possession of the photo. Nor did he

⁵ The function of a "set up" or "setting" is to establish more shelf space for the Respondent's products at its clients stores and facilities.

claim to know what was on the photograph.

After the August 13, 2002 incident with the security guards, Torres sought advice from the Union on how best to address his and his fellow employees' concerns with management. Either in September or October 2002, Torres and Santiago met with Union Representative Juarbe who offered them advice on organizing techniques. Following that meeting, Torres and Santiago began handing out union authorization cards on behalf of the Union to fellow employees and telling them that the Union could better represent their interests.

By September 5, 2002, the Respondent was aware that employees were trying to organize themselves as evident by a letter circulated that day by its president, Ramon Calderón, to employees expressing, inter alia, his opposition to unionization. (GCX-3).⁶ The letter, which initially touts the Company's successes, describes how "a very small group" of former and current employees had attacked the Respondent in television and radio messages and in anonymous mailings to the Company.⁷ It explained that but for the publicly-aired messages, it would have ignored the attacks from what it described as former employees who had been fired for justified reasons. Calderón stated in his letter that once the attacks became public, he was compelled to write the letter to all employees, and emphasized in this regard that "when there is a serious threat to your job, your future and the future of your family, you have the right to know it." Calderón further advised employees in his letter that they "have an obligation to act to assure and guarantee that those people who attack Holsum and as a result your job, are not successful." Calderón closed his letter by encouraging employees to read and adhere to the Company's union avoidance policy, and to say "'NO' to the union agitators."⁸

Santiago testified that not long after Calderón distributed his letter, his immediate supervisor, Reynaldo Serrano, approached and questioned him about it. According to Santiago, on September 16, 2002, Serrano called him into a small office cubicle in the Respondent's salesroom and asked Santiago if he had received the letter and, if so, what he thought about it. Santiago admitted receiving Calderón's letter but refused to comment on its contents. When Serrano pointed out that he had to record Santiago's views, the latter replied only that he did not believe Calderón prepared the letter himself because it was poorly written. Santiago claims that Serrano stopped writing at this point and asked Santiago why he was "disgusted" with the Company. Santiago answered that he was not disgusted with the Company, and that the fact that he had removed some of his personal accessories from the company vehicle he was assigned to drive did not mean he was disgusted. As to why he removed his personal items from the Company vehicle, Santiago explained that he did so because the Respondent had already fired

several individuals and he did not know what might happen to other employees like himself. Santiago further recalled that during this same conversation, Serrano questioned him about the television interview.

Santiago's above account of his meeting with Serrano is undisputed as the Respondent chose not to call Serrano as a witness.⁹ I credit Santiago and find that he, in fact, was asked by Serrano if he had received Calderón's letter and what he thought of its contents for, as will be discussed below, Serrano's conduct in this regard is consistent with similar interrogations conducted by supervisors of other employees. Serrano's statement to Santiago, which I find Serrano made, that he was expected to prepare a report on whether he, Santiago, had received Calderón's letter, leads me to believe, particularly in light of the other interrogations that occurred, that Serrano's interrogation of Santiago was part of an overall plan by the Respondent to ascertain whether or not employees shared Calderón's antiunion views.¹⁰

Torres was also questioned about Calderón's letter on September 14, 2002, by supervisor Benito Torres (B. Torres). He testified, without contradiction, that around 6 a.m. on that day, as he was in his Company vehicle about to begin his route, B. Torres approached and asked if he had received the letter the Respondent sent to all employees. When Torres replied that he had, B. Torres asked what he thought of it. Torres responded by asking B. Torres if he had received a copy of Calderón's letter. When B. Torres answered that he had received Calderón's letter, Torres responded that he, B. Torres, should therefore know what the letter said, and declined to give B. Torres his view of the letter. Undeterred by Torres' refusal to give an opinion, B. Torres insisted that he needed some response from Torres regarding the letter. Torres again refused to do so, stating he did not want to compromise himself. (Tr. 167-168). B. Torres did not testify. Accordingly, Torres' above undisputed account is credited and found to be true.¹¹

Salesperson Rolando Rodriguez attended the two July 2002, employee organizational meetings, having earlier learned of them through Santiago and Torres. He also showed up for the

⁶ Appended to and circulated along with Calderón's September 5, 2002 letter to employees was a copy of a union avoidance policy which the Respondent enacted on March 1, 1999.

⁷ Santiago admitted taking part in an interview that subsequently aired on local television in which he discussed with a reporter what he perceived to be instances of "persecution" occurring at the Company (Tr. 456).

⁸ Neither the contents nor distribution of Calderón's letter is alleged to be unlawful.

⁹ As evident from its brief, the Respondent apparently chose to intentionally not call Serrano to refute or explain the remarks attributed to him by Santiago. (RB:33)

¹⁰ Support for a finding that the Respondent, soon after Calderón issued his September 2002 letter, engaged in a pattern of interrogations designed to ascertain how employees felt about the Union, can be gleaned from a second letter issued by Calderón to employees several months later, in May 2003 (see GCX-2). In the May 2003 letter, Calderón tells employees that following distribution of his September 2002 letter, "a great majority of you assured us through the supervisors and executives" that they were opposed to a union and that Holsum could count on them. The Respondent did not explain how its supervisors and managers acquired such knowledge. I find it highly unlikely that employees would have, on their own, spoken with their supervisors and/or managers regarding this subject. Rather, I find it more likely than not that, as credibly testified to by Santiago and others, the Respondent's supervisors, following Calderón's distribution of his September 2002, letter, were instructed to interrogate employees to determine where they stood concerning the Union.

¹¹ On September 15, 2002, Torres prepared a written statement describing his September 14, 2002, encounter with B. Torres (see, RX-9).

third employee meeting in August, but testified that the meeting was never actually held because of the incident that occurred involving the Los Angeles Guardianes agents, J. Figueroa and E. Gonzalez. Rodriguez recalled receiving a copy of Calderón's September 2002 letter to employees (GCX-3), and to being questioned about it by his immediate supervisor, Antonio Nieves. Thus, he testified, without contradiction, that in September 2002, Nieves called him to a private meeting held in Nieves' office cubicle in the sales department. At this meeting, Nieves discussed some work-related issues relating to product spoilage with Rodriguez, and informed Rodriguez that he had visited some of Respondent's customers on Nieves' route and found everything to be fine. Nieves then brought up the subject of Calderón's September 5, 2002 letter which, as noted, reflected Calderón's strong antiunion views. Thus, he asked Rodriguez if he had received a copy of Calderón's letter, and what he thought about it. Rodriguez replied that he had, but that he had not yet fully read it and that, in any event, he, Rodriguez, did not believe much in unions.¹² Nieves further asked Rodriguez at one point what he thought of the employee meetings that had been held. Rodriguez responded that he did not care much about the meetings either, and then asked Nieves why he was asking him such questions. Nieves replied, "No, just for me to know." (Tr. 93). Nieves, according to Rodriguez, never asked him who had attended, or what had occurred at, the meetings (Tr. 103). Nieves did not testify. Accordingly, I credit Rodriguez and find that sometime in September 2002, soon after Calderón distributed his letter, Nieves asked Rodriguez if he had received the letter and what he thought of it, and what Rodriguez thought about the employee meetings.

The record is sparse regarding what occurred with the organizational drive between October 2002 and February 2003. It does appear, however, that Torres and Santiago continued to solicit support for the Union during the early months of 2003. Thus, Torres testified, without contradiction, that between February and April 2003, he spoke with co-workers about the Union "almost every afternoon" after work at the Respondent's employee parking lot, and that, during that period, he was able to solicit cards from some 10–15 employees. Torres admits that he at no time was questioned by any supervisor regarding his union activities in the Company parking lot, but did recall seeing at one point, Respondent's human resources director, Nelson Velez, an admitted supervisor, sitting for some 15 minutes in his parked vehicle near the guard hut adjacent to the parking lot (Tr. 361–362). Velez was not asked about and consequently did not deny Torres' above claim. Santiago similarly testified, also without contradiction, that between March and April 2003, he distributed and collected signed authorization cards from employees either at their homes or at the Respon-

dent's facility (Tr. 220–221; 439). Their undisputed testimony in this regard is credited.

On May 9, 2003, Calderón, as previously noted, sent another letter to "members of the Sales Department and their families," similar to the one he mailed out on September 5, 2002 (GCX-2). The letter advised employees that the Respondent had, in the past several days, become aware that "a union continued to threaten the future and security of the Holsum families." In his letter, Calderón reiterated his opposition to a union, stating that a union would not be beneficial nor in the best interest of employees, the Company, or its clients, and further expressed his appreciation to employees for assuring Holsum, "through supervisors and executives, that Holsum could count on them—that we do not need a union here." Calderón also noted in his letter that while Holsum was not sure which union had been involved with its employees in 2002, he suspected it was either Congreso de Union Industriales or another labor organization, FUPU. He pointed out, however, that the Company had recently become aware that another labor organization, the United Steelworkers of America (USW), was now involved. Calderón cautioned employees in the letter against signing an authorization card for the USW, warning that "a union threat hangs over us, the whole Holsum family."

In May 2003, sometime after Calderón issued his letter, Sales Supervisor Antonio Rivera questioned former sales employee David Montalvo about it. Thus, Rivera and Montalvo, both of whom testified at the hearing, agree that such a conversation took place at the parking lot of one of Respondent's customers, Stedletta Supermarket. Montalvo was, at the time, providing service to Stedletta, and Rivera came along to evaluate Montalvo's work. Rivera claims that at one point during their conversation, he asked Montalvo if he had received a copy of Calderón's letter, and when the latter said he had, told Montalvo to "read it and study it." He further recalled asking Montalvo if he, Montalvo, had received any phone calls or visits from union representatives, and that Montalvo replied he had not. (Tr. 968–969). Rivera did not explain why he solicited such information from Montalvo.

Montalvo's version of that conversation is at odds with Rivera's above account. According to Montalvo, Rivera asked him if he "had received a letter from Holsum regarding the union issue," and what his opinion was of the letter. When Montalvo admitted receiving and reading the letter, and commented that he agreed with it, Rivera told him he was going to give Montalvo another copy so that he could read and be sure of what was being said in it. Montalvo further recalled Rivera saying that he knew "people from the union were visiting employees at their house[s]," and asked Montalvo if he had received such a visit. Montalvo told Rivera that he was not at that address anymore and, consequently, did not know if any individual from the Union had gone to his house. Rivera, according to Montalvo, went on to express his own gratitude to the Company and then asked Rivera if he believed the Company paid well. Montalvo purportedly responded in the affirmative at which point the conversation ended. (Tr. 51–52, 54).

I credit Montalvo's version of what Rivera said to him, although I also believe, given Rivera's admission, that he further

¹² During his direct examination by counsel for the General Counsel, Rodriguez stated that Nieves was the one who first broached the subject of the union during their conversation. However, when presented with an affidavit previously given to the Board showing otherwise, Nieves admitted that he, not Nieves, was the one who first mentioned the union in their conversation. (Tr. 119). This misstatement of fact by Rodriguez was, in my view, not intentional but rather the product of a poor recollection on the question of who, in fact, had broached the subject first. It does not, I find, affect his overall credibility.

questioned Montalvo on whether he had received any phone calls from a union representative. From a demeanor standpoint, Montalvo was a convincing witness whose testimony, I find, was more trustworthy and believable in comparison to Rivera's testimony. Rivera's testimony on cross-examination, that he never actually asked Montalvo if he had received a specific letter and had, instead, questioned Montalvo on whether he had received some general correspondence from the Respondent was confusing and, in my view, inconsistent with his testimony on direct examination that he asked Montalvo "if he had received a letter that the Company was sending." Rivera's version simply lacked the ring of truth and, except for his admission that he questioned Montalvo on whether the latter had received any phone calls or visits from union representatives, is not worthy of belief. Accordingly, I credit Montalvo and find that he was indeed questioned by Rivera on whether he had received and read a copy of Calderón's May 2003 letter regarding the Union, and whether he had received any phone calls or home visit from union representatives.

Santiago testified that on May 6, 2003, as he was reviewing the merchandise he was about to load onto his truck for delivery, Rojas approached and asked if he knew Torres had been fired. Santiago nodded his head acknowledging that he knew, at which point, he contends, Rojas advised him to be careful because he was going to be next, and to take care of his job. (Tr. 449) The conversation, according to Santiago, ended when B. Torres approached them. Rojas denied having any conversation at all with Santiago in May 2003. (Tr. 813). I did not, however, find Rojas' denial overly convincing. Rather, his denial was rather abrupt and, in my view, done with little or no thought given to the question of whether he, in fact, had spoken to Santiago at any time during the month of May 2003 (some 7 months earlier), in the "basket unloading area" or spoken with Santiago about Torres at any location during the same month of May. Rojas, in my view, was not being candid with his response, but rather gave the expected denial without regard to whether or not it was, in fact, true. Santiago, on the other hand, came across as more convincing as to this particular conversation. As between the two, I found Santiago's account more credible than Rojas' rather terse denial of the incident. Accordingly, I find that on May 6, 2003, after asking Santiago if he had heard of Torres' discharge, Rojas cautioned Santiago to be careful and to take care of his job because he was next.

Santiago further contends that he too was questioned in mid-May 2003, about Calderón's May 9, 2003 letter by his immediate supervisor, Juan Pablo Velez (J.P. Velez). Thus, he testified, without contradiction, that as he was heading towards an unloading area, J. P. Velez approached and asked if he had received a letter sent to Holsum employees at the beginning of the month. When Santiago replied that he had, J. P. Velez asked Santiago what he thought of the letter. Santiago responded that he had no opinion regarding the letter because Serrano had asked the same question of him in September 2002, regarding Calderón's earlier letter. J. P. Velez nevertheless continued questioning him, asking at one point what Santiago thought about unions, and whether Santiago was going to allow a person to come from the outside into his house to make decisions about what was done at his house. Santiago re-

sponded that things at Holsum were not going to be like that, and that the ones who would be making the decisions would be the employees. J.P. Velez continued asking Santiago if he had anything else to say to him, at which point Santiago stated that he wanted to make one thing very clear; that he, J.P. Velez, knew full well that he (Santiago) was one of the organizers of the employee meetings held in July 2002, and that if he had to do it all over again, e.g., organize the employees, he would do so. The conversation ended at the point. J.P. Velez did not testify. Accordingly, Santiago's uncontested account of what J.P. Velez asked and said to him in mid-May 2003 is found to be credible and accepted as true.¹³ Thus, I find that J.P. Velez questioned Santiago in mid-May 2003, on how he felt about Calderón's May 2003 antiunion letter, and that, at one point in their conversation, Santiago admitted to J.P. Velez that he, Santiago, had been one of the organizers of the 2002 employee meetings, and would not hesitate to do so again.

In May 2003, alleged discriminatees Torres and Santiago were terminated, the former purportedly for violating a Company rule prohibiting drivers from carrying unauthorized passengers in Company vehicles, the latter purportedly for removing or using company property, e.g., distributing 6 cups of coffee to nonemployees, without authorization.

Torres worked for the Respondent as a salesperson from 1988 until discharged on May 1, 2003. Respondent's general sales manager, Victor Perez Cosme (Perez), testified that this particular policy, referred to herein as the "no helper" policy, has been in place since on or around September 23, 1995, when it was first announced by Calderón at a meeting of managers and sales supervisors. Calderón, according to Perez, also announced at this meeting that the penalty for a first-time violation of this policy was the immediate discharge of the offending employee, and that supervisors who knew of and condoned the practice by employees were also subject to immediate discharge (Tr. 764).¹⁴

Perez initially testified that prior to 1995, no such policy existed and no employee had ever been disciplined for carrying nonemployees in Company vehicles. However, when presented with documentary evidence showing that disciplinary warnings were in fact issued to employees prior to 1995 for having nonemployees in Company vehicles, Perez admitted that such a policy had, indeed, been in place prior to 1995, but that he simply had forgotten about it. (Tr. 661; 736). According to Perez, this particular prohibition is found in the Respondent's "Standards of Conduct" handbook, falling under the third and sixth "Examples of Improper Conduct" itemized on page 5 of the handbook (see GCX-6[b]).¹⁵

¹³ The fact that Santiago's testimony was found not to be credible in one respect does not require rejection of his entire testimony or render other aspects of his testimony unworthy of belief, for it is quite common for a trier of fact to believe some, but not all, of a witness' testimony. See, *Americare Pine Lodge Nursing and Rehabilitation Center*, 325 NLRB 98, 99 (1997), and cases cited therein.

¹⁴ The Respondent, on brief, described the penalty imposed as a "one strike and you're out" rule (RB:22, 24).

¹⁵ The "third" example of improper conduct cited by Perez states that it is improper "to allow any person, relative, or stranger, who is not duly authorized, to enter or remain in the areas of work and receiving,

Rojas, a sales supervisor since around 1992, also testified to the existence of the “no helper” policy, but claimed that the policy has been in effect since before 1995, and that, beginning in 1995, the Respondent began emphasizing it more. He further claimed that employees caught violating the policy were subject to immediate dismissal for a first time violation. (Tr. 814–815). Rojas further testified that, to his knowledge, the “no helper” policy is not a written one. His assertion in this regard appears to contradict Perez’ claim that the policy is contained in Respondent’s “Standards of Conduct” handbook.

Ivan de la Torre Cruz (de la Torre), a former sales supervisor for the Respondent, was called as a witness by the Respondent. He testified that he last worked for the Respondent in March 2003, and that, prior to voluntarily leaving the Company, he served as a sales supervisor for approximately 10 years, or since about 1993. He contends that during that period, the Respondent had a “no helper” policy in effect, as well as an “immediate discharge” rule for violations of the policy. (Tr. 853).

Perez admits that employees never received written notice from Calderón of the new policy. He testified, however, that within a day or so of the meeting with Calderón, he met with and informed his supervisors of the new policy and of the “immediate discharge” or “one strike, you’re out” penalty that would be imposed for violations, and further instructed them to notify the salespersons under their charge of the policy and of the penalty imposed for its violation, and to report back to him in writing that they had done so. (Tr. 660; 713; 722; 764). Copies of written statements or memos sent by the sales supervisors to Perez in response to his instructions were received into evidence as Respondent’s Exhibit 22.¹⁶ A review of some of those supervisory statements reveals an inconsistency between what Perez and Rojas claimed was the mandated penalty for a violation of the policy, e.g., immediate dismissal, and what the sales supervisors told employees might occur from a breach of the

or in the restricted areas of the little store or that of the Company”, the “sixth” example, also cited by Perez as purportedly serving as a ban on carrying unauthorized persons in Company vehicles, states that it is improper “to allow, help or conspire with any person to violate safety rules.”

¹⁶ RX–22 contains nine such memos. They identify the following as the sales supervisor for the corresponding Sales division in late 1995: Sabino Alvarado (Division 1); Orlando Rosado (Division 2); Jose A. De Jesus (Division 3); Richard Ortega (Division 4); Juan Pablo Morales (Division 5); A. Nieves (Division 6); A. Rivera (Division 7); Benito Torres (Division 8); Thomas Cuebas (Division 9). The record does not make clear whether the Sales Department was made up of only nine divisions or whether it may have included others. However, both Rojas and de la Torre, as noted, testified to being sales supervisor since around 1992 or 1993. Assuming the truth of their assertions, then presumably they too must have received the same instructions from Perez to notify the salesmen they were then supervising of the “no helper” policy and to report back to him in writing that they had done so. RX–22, however, contains no such memos from Rojas and de la Torre to Perez.

It appears that Joe Torres, who did not testify, was present when Perez met with his supervisors to inform them of the policy (see RX–22, document No. 7). In fact, document No. 8 of RX–22, a 9/28/95 statement from supervisor B. Torres describing the instructions he gave employees under his charge about the new policy, is addressed to Joe Torres, not to Perez.

policy.

Division 2 Sales Supervisor Orlando Rosado’s memo to Perez, for example, makes reference to a September 22, 1995 meeting he attended with Joe Torres on the use of “helpers” by salespersons in Company vehicles, and describes how he and other supervisors at the meeting “were authorized to take disciplinary action to abolish this practice, including the issuance of warnings and dismissal.” Rosado’s statement thus suggests that supervisors could issue warnings to, rather than immediately dismiss, employees who were caught violating the “no helper” policy. Division 3 Supervisor Jose A. DeJesus’ memo to Perez reflects that DeJesus told his employees only that “they *could* lose their jobs” for violating the policy, not that they *would* be immediately terminated for doing so.

Division 8 Supervisor B. Torres’ memo, addressed to Joe Torres, states that “instructions were given to all salesmen strictly barring the use of helpers on their respective routes,” and that, if they violated this policy, “they will be given a warning in writing that could be prejudicial to their jobs.” (RX–22, document No. 9). Thus, both B. Torres and Rosado appear to have told their respective employees the same thing, to wit, that violation of the policy could result in the issuance of a warning, rather than an immediate discharge.

Division 9 Supervisor Thomas Cuebas’ memo (see, RX–22, document No. 10), addressed to all Division 9 salespersons, informed the latter that the “transportation of helpers on Company vehicles is strictly forbidden,” and that any salesperson caught with a helper in the vehicle would “be subject to any sanction that is provided at that time for violation of this rule.” Cuebas further warned employees that repeated violations of the “no helper” policy could lead to “suspensions.”¹⁷

Respondent’s Exhibit 22 further reflects that other supervisors (e.g., A. Nieves, Sabino Alvarado, Juan Pablo Morales, Richard Ortega, A. Rivera) prepared and submitted memos stating they had discussed the new policy with their employees. Their memos, however, unlike those of Supervisors Rosado, DeJesus, B. Torres, and Cuebas, give no indication that said employees were ever told what, if any, penalty could or would be imposed for a violation of the “no helper” policy. While I do not doubt, therefore, that the Respondent has long maintained a policy prohibiting its salespersons from carrying unauthorized passengers in Company vehicles, the supervisors’ memos contained in RX–22 do not support, and indeed appear to undermine, Perez’ and Rojas’ claim that the Respondent has likewise maintained and enforced a “one strike and you’re out”

¹⁷ The English-language version of Cuebas’ memo submitted by the Respondent into evidence translates the last sentence of the memo as stating that “repeat offenders could be dismissed.” The last sentence in the Spanish version of Cuebas’ memo reads as follows: “*De proseguir podría conllevar hasta suspensiones.*” Counsel for the General Counsel on brief (p. 44), contends, and I agree, that the correct English language translation for the word “*suspensiones*” is “*suspensions*,” not “*dismissal*” or, as translated in the English version of Cuebas’ memo, “*dismissed*.” The Respondent concedes as much as it has, on brief (p. 24, fn. 4), used the word “*suspensions*” when referencing Cuebas’ memo. Accordingly, I find that Cuebas’ memo warned employees that “repeated violations” of the “no helper” policy could result in “suspensions,” not dismissals.

rule for violations of the policy. As noted, the supervisors' memos either make no mention of an "immediate dismissal" or "one strike you're out" rule, or reflect that employees were told only that some lesser form of punishment, such as a warning or a suspension, might be meted out for violations of the policy.

The Respondent's claim that it has, since September 1995, maintained and adhered to a "one strike you're out" rule for violations of the "no helper" policy is also undermined by the testimony of former employee Eduardo Vega Toledo (Vega).¹⁸ Vega testified that in or around September 1996, he was seen by Perez driving around with an unauthorized passenger (a cousin) who was not a Holsum employee in his Company vehicle. Vega admits that he drove around with his cousin in the company vehicle for several hours, and further admits having been told of the "no helper" policy by his then supervisor, Ortega. Vega claims that when he returned his vehicle to the Respondent's facility later that day, Perez told him he had seen Vega near the Rexville Plaza in the town of Bayamon with the unauthorized passenger. When Vega explained that the passenger was his cousin, Perez, Vega claims, decided to give him another chance, but warned him not to do it again. Perez denied the above incident.

I credit Vega and find that the incident occurred as described by him. Certain factors, including inconsistencies in Perez' testimony, convince me that Perez was not being candid regarding this incident. For example, while Perez on cross-examination emphatically denied seeing Vega in 1996 driving around with an unauthorized person in a company vehicle, on direct examination by Respondent's counsel, Perez stated, in less certain terms, only that he had "no recollection" of the incident. (Tr. 609; 673). Further, Perez' attempt to cast doubt on Vega's testimony on how he learned of the "no helper" policy is contradicted by Respondent's own documentary evidence, as well as by Perez' own testimony.

Thus, initially, Perez implicitly disputed Vega's assertion that he was notified of the "no helper" policy by Supervisor Ortega, by asserting that Sales Manager Serrano, and by implication not Ortega, was Vega's supervisor in September 1995, when the rule went into effect, and, therefore, the one who notified Vega of the new policy. In support of his assertion, Perez explained that soon after the policy went into effect in September 1995, Serrano provided him with a document, presumably similar to the memos contained in RX-22, signed by employees under Serrano's supervision, including Vega, acknowledging that they had been informed by Serrano of the new policy. Perez could not recall the specific contents of the Serrano memo, or when he last saw the memo. However, when pressed on this issue by Charging Party's counsel, Perez was forced to admit that Serrano was not a sales supervisor in 1995, but rather became one sometime in 1997 or 1998. Prior to assuming his duties as a sales supervisor in 1997 or 1998, Serrano, according to Perez, managed several of the Respon-

dent's "Tiendita" stores,¹⁹ and did not supervise any salespersons. Serrano, therefore, could not have been Vega's supervisor in 1995, when the policy went into effect and, by implication, not the one who informed Vega, and presumably other Division 4 salespersons, of the new policy. (Tr. 676-678). The Serrano document that Perez claims he received purportedly showing that the former had notified Vega of the policy was not produced by the Respondent, nor, as noted, was Serrano called to corroborate Perez' claim in this regard. Had Perez received such a memo from Serrano, the Respondent, I am convinced, would have produced it or, at the very least, called Serrano to corroborate Perez' account. The Respondent's failure to do so, coupled with the fact that Serrano, by Perez' own admission, was not a sales supervisor in 1995, further convinces me that Serrano never sent any such memo, and that the Respondent did not call Serrano as a witness for fear that he would not have supported Perez' assertions.

Bolstering Vega's testimony that Ortega, not Serrano (as claimed by Perez), notified him of the "no helper" policy in September 1995, is document No. 6 of RX-22, Ortega's memo to Perez dated "9-28-95," notifying the latter that all the Division 4 salesmen, which presumably included Vega, had been informed of the new policy. The memo is signed by Ortega as the Division 4 supervisor. Perez did not deny receiving the memo, and testified only that he could not recall receiving it on the date shown therein, or whether Vega was at the time part of Division 4 sales group (Tr. 767). Although called as witness by the Respondent, Ortega was never asked to confirm or deny Vega's claim that he, Ortega, was his supervisor in 1995, and the one who notified him (Vega) of the "no helper" policy.

Perez' denial of the incident is found not to be credible. Rather, I find that, as testified to by Vega, in September 1996, Perez observed Vega with an unauthorized passenger in his Company vehicle and that, while he cautioned Vega about the incident, Perez did not discharge or otherwise discipline him for violating the Company's "no helper" policy. Perez' testimony regarding the "no helper" policy particularly was also unconvincing. Perez, for example, was inconsistent in describing the enactment of the "no helper" policy, claiming at first that the policy did not exist prior to 1995, but subsequently admitting that the policy was in existence before 1995. Further, his testimony that the "no helper" policy derives from the language in Respondent's 1985 "Standards of Conduct" handbook is simply not credible, for not only is there no specific mention in the handbook language cited by Perez of a "no helper" policy, Rojas' own testimony that the policy is not a written one undercuts Perez' reliance on the vague wording of the handbook to sustain his claim. Indeed, I find it more likely than not that, as testified to by Rojas, the "no helper" policy is an unwritten rule that the Respondent has had since long before 1995, and that beginning in the latter part of 1995, the Respondent decided to begin a more stricter enforcement of that policy.

I am not, however, convinced that along with his September 1995, decision to begin enforcing the "no helper" policy more

¹⁸ Vega had been on workman's compensation until on or around October 20, 2003, when his "employment reservation" under the Puerto Rico's workman's compensation rules expired, and his employee status was ended.

¹⁹ Perez could not remember if Serrano's duties as manager of the "Tienditas" occurred in 1995 or 1996.

stringently, Calderón also instituted an “immediate discharge” or a “one strike, you’re out” rule for violators of the policy. Several factors cause me to doubt that claim. There is, for example, the unexplained discrepancy between Perez’ assertion that this purported “immediate discharge” rule was implemented by Calderón in September 1995, and de la Torres’ assertion that the “immediate discharge” rule and “no helper” policy were in effect during his entire tenure as sales supervisor, which, according to the latter, began sometime in 1993, e.g., some 2 years before Perez claims it was first instituted by Calderón. Rojas, did not explain how long the “immediate discharge” rule had been in effect, and stated only that the “no helper” policy had been in place prior to 1995, and that the Respondent simply began adhering to it more forcefully sometime in 1995. These inconsistencies and/or ambiguities in Perez’, de la Torre’s, and Rojas’ testimony regarding the “no helper” policy and “immediate discharge” rule, as stated, were not explained by the Respondent, thereby undermining its assertion that Calderón announced and put into effect an “immediate discharge” policy in September 1995.

Further undermining its claim in this regard is the absence of any explanation as to why, if de la Torre and Rojas were, as they claim, sales supervisors in September 1995, when Perez instructed all sales supervisors to notify their employees of the “no helper” policy and of the “immediate discharge” rule, and to report back to him in writing that they had done so, there are no memos from either de la Torre or Rojas among the other sales supervisors’ memos contained in RX-22. Presumably, as sales supervisors during the period in question, both de la Torre and Rojas would have received, and been expected to comply with, Perez’ instructions. That no such memos were produced by the Respondent for de la Torre and Rojas could mean that the latter either (1) were not sales supervisors in September 1995, as they claimed to be, and simply misrepresented themselves as such in their testimony; (2) were supervisors but failed, for whatever reason, to comply with Perez’ instructions; or (3) they did comply with Perez’ instructions but, for reasons unknown, their memos were not included by the Respondent among those received into evidence as Respondent’s Exhibit 22.²⁰ Clearly, it was incumbent on the Respondent, as the party having exclusive control over the supervisors and/or their work-related documents, to clarify or explain these ambiguities or inconsistencies. Its failure to do so thus casts a cloud over the reliability and trustworthiness of de la Torre’s and Rojas’ assertions regarding the “no helper” policy and “immediate discharge” rule.

The fact that Vega was not disciplined for his 1996 violation of the policy, and that the various supervisors’ memos received into evidence as RX-22 make no mention of any such rule, or at most reflect that employees were told only that they could be

subject to some lesser form of punishment, e.g., a warning or suspension, for violating the “no helper” policy, further serves to undermine the Respondent’s claim that it has, at least since September 1995, applied and enforced a “one strike, you’re out” rule for such violations.²¹ I find it inconceivable that if, as claimed by Perez, he specifically instructed his sales supervisors to notify their salespersons of the “one strike, you’re out” rule, the supervisors would have intentionally ignored his instructions and chosen instead to tell employees that some lesser form of punishment might result from a violation of the “no helper” policy. Rather, I am convinced that either no such rule was put into effect by Calderón in late 1995, or, if it was, the supervisors were never instructed to convey such a message to their employees. The former scenario, however, makes imminent more sense to me, for if Calderón had indeed established a “one strike, you’re out” rule for violations of the “no helper” policy with instructions to notify all salespersons of its implementation, Perez undoubtedly would have conveyed that information to the supervisors with instructions to disseminate it to their salespersons, and the supervisors would in turn have done so and reported the same to Perez. That the supervisors’ memos do not so much as hint at a “one strike, you’re out” rule for violations of the “no helper” policy leads me to conclude that no such rule was ever created or put into effect by Calderón.

Nor, as argued by the Respondent, does the dismissal of employees Andres Vazquez Rosa (Vazquez) in November 1997, Edwin Gonzalez Vivas (Gonzalez) in January 1998, and Carlos Medina Huertas (Medina) in September 1999, for violating the “no helper” policy warrant a different conclusion, for while documentary evidence does indeed show that these three individuals were terminated for violating the “no helper” policy (see RX’s 11–13), said documents do not reveal whether this was the first, or subsequent, violation of the “no helper” policy

²⁰ If de la Torre and Rojas were not sales supervisors in September 1995, then their claim that they were is misleading, rendering suspect their further testimony regarding the “no helper” and “immediate discharge” policies. If they indeed were sales supervisors, it is highly unlikely they would have deliberately ignored Perez’ instructions. However, if they did carry out Perez’ instructions then, like the other sales supervisors, they would have prepared a memo confirming what they said to employees regarding the “no helper” policy.

²¹ The Respondent, on brief (p. 24, fn. 4), concedes that the wording of some of the supervisory memos “left open the possible interpretation” that employees might first be given a warning, rather than immediately terminated, for a violation of the “no helper” policy. The Respondent insists, however, that employees could reasonably have understood from certain language in the memos, e.g., that the practice of using helpers was *absolutely* or *expressly forbidden*, that supervisors could take disciplinary action to *abolish* the practice, and that employees could *lose their jobs* for continuing the practice, that a “one strike, you’re out” rule was being put into effect. While I have no doubt that employees would have understood from their supervisor’s memo that the Respondent was no longer willing to tolerate abuses of its “no helper” policy, nothing in the wording of those memos suggests that the Respondent was imposing an “immediate discharge” or a “one strike, you’re out” rule for violations of the policy. Rather, the memos, as noted, make reference only to warnings or suspensions for violations of the policy which, in my view, would reasonably have led employees to believe that they could receive a warning, or at worst, a suspension, for future violations of the policy. Any ambiguity as to what message the supervisors were instructed, or intended, to convey to employees in their memos could easily have been resolved by having the supervisors testify as to what they said to their employees. However, except for Ortega and Rivera, none of the sales supervisors whose memos form part of RX-22 were called to testify. As to Ortega and Rivera, neither was questioned about the substance of their memos.

committed by these employees.²² In fact, at no time during the hearing did the Respondent contend that any or all of these three employees were terminated pursuant to its alleged “one strike, you’re out” rule. Rather, this particular claim is being raised by the Respondent for the first time in its posttrial brief. The claim that these three individuals were discharged under a “one strike, you’re out” rule, nevertheless, lacks evidentiary support and is rejected as without merit. In sum, I find no record evidence to support the Respondent’s claim that it has long maintained and followed a “one strike, you’re out” rule for violations of the “no helper” policy.²³

Turning to Torres’ discharge, the facts show that on April 26, 2003, Torres was in his Company van servicing his route. As he waited for a red light to change, an individual, whom Torres had seen on occasion but did not personally know, boarded the van and asked for a ride to the next traffic light about a mile down the road. Torres testified that the individual’s sudden appearance in his vehicle startled him, and that he told the individual several times to get off because nonemployees were not allowed to ride in the vehicle. The individual, he contends, persisted in asking for a ride to the next traffic light and, after the traffic light changed and the cars behind began honking their horns, Torres relented and drove the individual to the next light where he disembarked. (Tr. 175–176). As to why he did not remove the individual from his vehicle, Torres explained that the individual “was very insistent, and I would have had to struggle with the person,” and that, in his view, taking the individual to the next light would have resolved the problem faster (Tr. 177).

After dropping off the passenger, Torres continued on his way and, at the third light following the drop-off point, Perez pulled up alongside the van and asked Torres about the passenger he had just dropped off. Before he could respond, Perez, according to Torres, cut him off and remarked, “You know that nobody can ride in there.” Perez departed soon after making his comment to Torres. Perez’ version is that while driving near the Plaza Caribe Mall in the town of Vega Alta, he spotted Torres in the Company van and observed an individual inside. He admits he never saw the individual get into or out of Torres’ vehicle. (Tr. 611, 679). He claims that at some point, he questioned Torres as to why the individual was in his vehi-

cle, and Torres replied that the individual had gotten into and remained in the van despite being asked to step down. (Tr. 680). There is no evidence to suggest, nor does the Respondent contend, that Torres had engaged in similar conduct in the past.

On returning to Respondent’s facility after completing his route, Torres was approached by Serrano and asked what had occurred with Perez that day, explaining that he had received a call, presumably from Perez, which he did not fully understand. After Torres explained to Serrano what had occurred with the unauthorized passenger, Serrano asked Torres to provide Perez with a written statement regarding the incident. (Tr. 180). Torres did in fact prepare a written statement and delivered it to Serrano. The following day, as he was preparing to go on his route, B. Torres approached and asked Torres to meet with him. A meeting was thereafter held in Serrano’s office at which Torres, B. Torres, and Serrano were present. B. Torres began the meeting by telling Torres, somewhat nervously, that he no longer wanted Torres in his division, at which point Serrano interrupted and told Torres that the Respondent in fact no longer wanted him in its employ. (Tr. 181). B. Torres then chimed in that he did not want to beat around the bush, and that Torres was being suspended without “wages and employment.” When Serrano instructed Torres to turn in his medical plan card, his family medical plan card, and his ID card, Torres asked if he was being terminated or only suspended, because he saw no need to turn in his medical and ID cards if he was only being suspended. Serrano responded that he was simply complying with Company policy. Serrano then told Torres to report to the Company lobby on May 1, 2003. Neither B. Torres nor, as previously noted, Serrano testified in this proceeding. Accordingly, Torres’ unrefuted account of what occurred and was said to him by Serrano following the completion of his route on April 26, and by Serrano and B. Torres at the meeting the day after, is credited.

As instructed, on May 1, Torres appeared at the Company lobby, accompanied by Union representative Edwin Rivera, and asked to speak with human resources director, Nelson Velez. After a wait of some 20 minutes, Respondent’s area 1 manager, Rafael Sanchez Rivera (Sanchez), appeared and told Torres that Velez was at a meeting and would not be available. Torres then asked to speak with Serrano but was told that Serrano was also unavailable. Sanchez told Torres that he could speak with him in place of Serrano, but that the Rivera was not allowed to enter. When Torres stated that Rivera was representing him, Sanchez told Torres that since he was the employee involved, he would have to meet alone with Sanchez. Torres accepted and was led to an office where sales supervisor, Modesto Crespo, was present. Once inside, Sanchez told Torres that the Respondent had decided to dismiss him, and instructed him to turn in his various insurance and ID cards. Torres replied that he had already turned in his cards and then asked for a dismissal letter stating why he was being discharged. Sanchez replied that he had no dismissal letter to give him, at which point Crespo interjected that there was a possibility that Torres could resign and thereby not lose his rights. When he asked what rights Crespo was referring to, Sanchez stated, “Well, that’s all,” and escorted Torres back to the lobby. The above description of events is based on Torres’ undisputed account, for while

²² RX-11 through RX-13, consisting of the personnel action forms prepared on Vazquez, Gonzalez, and Medina in connection with their terminations, were received into evidence without discussion by way of a stipulation entered into between the Respondent and counsel for the General Counsel. No testimonial or other evidence, however, was produced as to the specific circumstances surrounding the dismissal of these three individuals. Although questioned about the documents, Perez never testified that these three individuals were terminated under the so-called “one strike, you’re out” rule.

²³ There was some vague testimony by Respondent’s Area 1 manager, Rafael Sanchez, regarding the termination of some two or three individuals for allowing nonemployee passengers in their Company vehicles. Sanchez, however, was unable to identify the individuals who were terminated, or when the terminations occurred. Nor is there anything in his testimony to indicate whether these individuals had previously engaged in similar conduct or whether they were discharged for a first time violation of the “no helper” policy. Sanchez’ testimony is too vague and ambiguous to be reliable. (Tr. 898).

both Sanchez and Crespo testified at the hearing on other matters, neither was asked to confirm or deny Torres' testimony in this regard. (Tr. 942-954). Torres' account is therefore credited and accepted as true.

As to Santiago, he was fired on May 29, 2003, allegedly for taking approximately 6 cups of coffee from a Company-owned dispensing machine and distributing them to several individuals outside the Company's premises without prior authorization which, the Respondent contends, violated Company policy.²⁴ Perez explained that the coffee machine was provided by the Company for the sole use of its employees, but that coffee could be distributed to nonemployees provided it is first authorized by a supervisor or other management personnel. He contends that specific permission was needed each and every time a nonemployee on Company premises sought to obtain coffee even though such permission may have been granted on prior occasions. However, nothing in his testimony, or for that matter elsewhere in the record suggests that employees were ever told or made aware of this alleged need for prior approval before employees could give coffee to a nonemployee on or off Company premises. Perez, in fact, admitted that the Respondent, as previously noted, does not have any written policy regarding the use of the coffee machine, or any limitation on the number of cups of coffee an employee can take from the machine, but does have a policy regarding the Company's actual products and property. (Tr. 672). He did not, however, describe or explain what the policy entailed.

Santiago gave the following account of the events leading up to his termination. On May 24, 2003, as he was preparing his truck for deliveries, Torres, who, as discussed below, was unlawfully terminated several weeks earlier for his union activities, called Santiago's cell phone and asked the latter if he could bring coffee out to some former employees and union organizers and/or representatives who were outside the facility distributing union literature.²⁵ Santiago agreed to bring some coffee out to Torres and the others. After loading his truck, Santiago went to the coffee machine and obtained some 6 cups of coffee. After dispensing the coffee, he laid the coffee on some steps and headed to the cafeteria nearby to get some sugar and/or sugar substitute. On his way to the cafeteria, Santiago ran into Crespo and asked the latter if he had some "Equal," an

artificial sweetener. Crespo handed him a packet of Equal at which time Santiago went to the sales room, retrieved his coffees, and headed to the shipping area where he got into his truck, and exited the Respondent's grounds. Once outside the facility, Santiago handed the coffees to Torres and proceeded to service his route.

Crespo testified that he witnessed Santiago at around 6 a.m. on May 24, 2003, getting the 6 cups of coffee from the coffee machine and that, soon thereafter, Santiago approached and asked him for a packet of "Equal." After handing Santiago the "Equal," Crespo claims he headed towards the dispatch area and at some point observed Santiago come down the stairway with the six coffees, get into his Company vehicle, and drive outside the Company's premises where he distributed the coffees to individuals standing there. Crespo was unable to identify the individuals to whom Santiago gave the cups of coffee. Thus, he could not say for sure whether they were or were not employees of Holsum. Nevertheless, viewing Santiago's conduct as inappropriate, Crespo prepared a report of the incident that same morning and delivered it to his superior, Perez. (see RX-34). In his report, Crespo informed Perez that he initially believed that Santiago was taking the coffee to fellow employees in the shipping area, and was surprised to see Santiago get into his Company vehicle and give the coffees "to some people outside the Company who weren't our employees." Crespo's assertion in RX-34, that the persons to whom Santiago gave the coffees were not Company employees, is inconsistent with the uncertainty he expressed at the hearing as to whether the individuals who received the coffees from Santiago were employees or nonemployees. Crespo insisted that he spoke to no one before preparing his report. (Tr. 946).

Crespo conceded that the coffee from the coffee-dispensing machine was free under Company policy. (Tr. 948). Asked to explain what was improper about Santiago's conduct, Crespo stated that it was Santiago's distribution of coffee off Company premises, not who the recipients were, that rendered the conduct inappropriate. According to Crespo, therefore, even if Santiago had been delivering the coffees to employees, the conduct would be improper if the delivery of the coffees happened to take place off Company premises. He contends that the Respondent maintains a written rule prohibiting the removal of coffee or "anything . . . outside Company premises."²⁶ However, Crespo, who has been in Respondent's employ for 28 years and a sales supervisor for 20 years, made no mention in his testimony of the requirement cited by Perez that employees must obtain permission from a supervisor or manager before giving coffee to a nonemployee.

Asked why he did not prevent Santiago from leaving the Company's premises with the six coffees, Crespo explained that he was busy at the time working with another group of individuals, and that, after observing Santiago with the coffees, the latter left in a matter of seconds giving him no time to ques-

²⁴ The Respondent does not have a specific policy governing employee use of the coffee machine. It contends, however, that the ban on employee distribution of coffee to nonemployees without prior authorization is governed by a general provision in its "Standards of Conduct" handbook (see GCX-6), a copy of which Santiago recalls receiving in 1990 when he began working for the Respondent. The provision in question, found on p. 5 of the handbook, reads as follows:

"No one can take or use, even if it is momentarily, anything that belongs to the Company, to other employees, and to our clients and acquaintances, without the explicit consent of the authorized management personnel."

²⁵ In addition to Torres, Santiago identified former employees Ramon Maisonette, and Carlos Martinez as being with Torres when he delivered the coffees. Both Maisonette and Martinez had been dismissed by the Respondent, according to Santiago. Also present with Torres, Martinez, and Maisonette were the Union's international representative, Edwin Rivera, and Union organizer, Carlos Davila (Tr. 402-403).

²⁶ Crespo did not explain what particular rule he was referring to. I find it unlikely that he was referring to the rule found on p. 5 of the Company's "Standards of Conduct" handbook (discussed in fn. 25, supra), as nothing in that rule makes reference to the removal of items off Company premises.

tion Santiago about the coffees. His explanation in this regard is somewhat at odds with the written report he prepared for Perez wherein he stated that he believed Santiago was taking the coffees to other fellow employees who were in the shipping area. Crespo never claimed in his report that he was unable stop Santiago because he was too busy with other employees, and because Santiago was gone before Crespo could question him about the coffees.

On May 29, 2003, some 5 days after the coffee incident, Santiago was returning to the facility after completing his route when he was summoned to a meeting with area I Sales Manager Sanchez and J. P. Velez, Santiago's immediate supervisor. At this meeting, J. P. Velez, according to Santiago, informed him that a situation had arisen concerning Santiago's distribution of coffee to people who were not employed by the Respondent and who were outside distributing union propaganda against the Company (Tr. 382-383). Santiago did not deny doing so, at which point Sanchez interjected that Santiago would have to prepare a written report of the incident. Santiago stated he did not feel comfortable preparing the report in the office where the meeting was being held, and Sanchez replied that Santiago could prepare his report elsewhere. Santiago then went to a nearby desk to prepare his report, but after thinking it over, decided not to write anything.

On returning to J. P. Velez' office, Santiago notified the latter that he was not going to submit a report because the coffees he handed out had been paid for (Tr. 388).²⁷ As Santiago turned to leave, Sanchez tells him to stay because he had something to say to Santiago. Sanchez then instructed J.P. Velez to close the door, at which point Santiago requested to have someone with him as a witness if Sanchez planned on closing the door. Sanchez purportedly responded that Santiago did not need a witness because what he was about to say would not take long. Sanchez then told Santiago that the Company "had become tired of going around this issue, of going in circles around this issue," and notified Santiago that he was being terminated. According to Santiago, at no time did Sanchez explain what "issue" he was referring to.²⁸ Santiago is then

instructed to turn in his health insurance and ID cards, and to return any Company uniforms he possessed so his final pay could be processed. He is also told that all further communications he may want to have with the Company would have to go through the personnel office. Sanchez then instructs J.P. Velez to escort Santiago to the parking lot.

Sanchez' testimony regarding Santiago's discharge is as follows. At some point prior to meeting with Santiago on May 29, 2003, Crespo purportedly notified Sanchez that he had seen Santiago "during the morning hours" take 6 or 7 cups of coffee to persons standing around outside the Respondent's property. (Tr. 900). On cross-examination, Sanchez stated that Crespo described the persons to whom the coffees were given as "union people." Based on Crespo's report, Sanchez, together with J.P. Velez, met with Santiago around 2 p.m. on May 29, 2003. Sanchez claims that at this meeting, he asked Santiago why he had taken coffees to people outside Company premises who were not employees or affiliated with the Company. When Santiago asked how Sanchez knew what he had done, the latter replied that Crespo had seen him remove "that Company property to give it to people who were unrelated to the Company." (891) Santiago purportedly told Sanchez that the individuals he gave the coffees to were friends of his who had called and asked him to bring them coffee, and that he did so without seeking authorization because he did not believe it would cause him any problem.

Sanchez then asked Santiago to give him his version in writing, and handed Santiago a pencil and notebook to prepare his report. He recalls that after leaving the office to go write out his statement, Santiago returned a few minutes later and stated he was not going to write the report because he had purchased the coffees at the Company cafeteria. Sanchez purportedly responded that, in a matter of only 8 to 10 minutes, Santiago had already changed his story of what occurred, and then informed Santiago that he was being discharged immediately for "removing Company property and giving it to persons who were unrelated to the Company." (Tr. 891). A personnel action form dated "5/29/03" and signed by Sanchez, J.P. Velez, Velez, and Perez shows the reason for Santiago's discharge to be his "removing of Company property without authorization." (GCX-8). The personnel action form, it should be noted, does not include as a reason for the discharge the assertion made by Sanchez at the hearing that the discharge was also prompted by the fact that Santiago gave the coffees to persons "unrelated to the Company." (See GCX-8). After asking Santiago to turn in his health insurance card, company ID card, and uniform, Sanchez had Santiago escorted off the premises. According to Sanchez, JP Velez was in the office during the entire conversation with Santiago. J. P. Velez, as stated, did not testify.

Inconsistencies in Sanchez' and Crespo's accounts cast doubt on the reliability of their version of events. For example, Sanchez' testimony regarding his meeting with Crespo does not square with the latter's account for, at the hearing, Crespo, as noted, testified that he did not know the identities of the individuals to whom Santiago gave the coffees, and that he had not

²⁷ Regarding his comment that the coffee had been paid for, Santiago explained that he was referring to the fact that he had, on occasion, seen nonemployees obtaining coffee from the coffee machine, and had, sometime between December 2002 and January 2003, overheard Perez and Serrano remark that the coffee machine "was paid for by the employees, and that all employees were able to make use of it." The manager and Serrano, according to Santiago, were "referring to people who did not belong to the Company and who were making use of it." (Tr. 389).

²⁸ On brief (p. 36, fn. 6), the Respondent states that the comment attributed to Sanchez by Santiago, to wit, that Sanchez was "tired of going in circles around this issue," was an "obvious" reference to the fact that Sanchez was getting tired of Santiago's changing story regarding the coffees. The Respondent's attempt to explain what Sanchez meant by this remark is, I find, an implicit admission that Sanchez in fact made the remark attributed to him by Santiago. However, its proffered explanation for what Sanchez meant by his "issue" remark is pure speculation, for while Sanchez testified in this proceeding (and incidentally did not deny making the remark), he was never asked to explain what "issue" he was referring to when he made the remark. Santiago,

as noted, testified that he never received any explanation or clarification from Sanchez as to what "issue" he, Sanchez, was referring to.

discussed Santiago's conduct with anyone before preparing and delivering his report on Santiago to Perez. Nor did Crespo make any mention in his testimony of speaking with Sanchez, or with anyone else for that matter, about Santiago's conduct at any time after he gave Perez his report.

Further casting doubt on the reliability of Sanchez' account is his description of when this conversation with Crespo allegedly took place. Crespo, as noted, testified, as did Santiago, that the coffee incident occurred on the morning of May 24, 2003. In his testimony, however, Sanchez, while not expressly stating that the coffee incident occurred on May 29, 2003, implicitly suggested as much. Thus, in describing on cross-examination what caused him meet with Santiago on May 29, 2003, Sanchez cited the fact that Crespo had told him how "Santiago removed the coffee that Mr. Crespo thought was . . . for the people who were loading up the truck *that morning*," the latter a clear reference to the morning of May 29, 2003. When asked again on cross-examination just when he was told by Crespo of the incident, Sanchez was unsure of himself, stating, "I don't remember if it was that day during the afternoon or the following day, I don't remember." (Tr. 906). Yet, in a subsequent June 6, 2003, memo to H. R. Director Velez notifying him of the incident, Sanchez suggests that Crespo had reported the coffee incident to him just "minutes" before he, Sanchez, met with Santiago on May 29, 2003.²⁹ (See RX-30). Crespo, as previously pointed out, made no mention in his testimony of any such discussion with Sanchez regarding this incident. Nevertheless, I am convinced that Crespo, at some point before Sanchez' May 29, 2003 meeting with Santiago, informed Sanchez that he had seen Santiago handing out coffee to "union people" who were outside the facility distributing union literature. My finding in this regard is based on Santiago's undisputed claim that he was asked by J.P. Velez at the May 29, 2003 meeting why he had given out coffees to individuals who were distributing union literature, as well as Sanchez' admission that Crespo described these individuals to him as "union people."

Sanchez was also inconsistent in describing who it was that questioned Santiago about the coffees during the May 29, meeting. Thus, while on direct examination, Sanchez testified it was he who asked Santiago about the 6 cups of coffee, in a June 6, 2003 letter to Velez advising the latter of Santiago's dismissal, Sanchez stated that it was J. P. Velez, not he, who first questioned Santiago about his conduct. Yet, when asked on cross-examination whether it was J. P. Velez who had questioned Santiago about the coffees, Sanchez ambiguously replied, "Yes, [J. P. Velez] started asking him and then I proceeded." (Tr. 903). I find, as testified to by Santiago, and as stated by Sanchez in his letter to H.R. Director Velez, that it was J. P. Velez who questioned Santiago about the coffee incident.

There is, in any event, no disputing that Sanchez, along with J. P. Velez, met with Santiago in Sanchez' office sometime after 2 p.m. on May 29, 2003, to discuss the coffee incident, for

²⁹ Thus, in his June 6, 2003 memo, Sanchez informed Velez that Santiago's version of the coffee incident "contradicted the version given *minutes* previously by the witness." The only witness identified by Sanchez in his testimony was Crespo.

Santiago testified to attending such a meeting. Several days after the meeting, Sanchez prepared a report on the coffee incident for HR Director Velez and advised the latter that he had terminated Santiago "for disposing and giving away Company property." (RX-30). Sanchez in his report did not mention Santiago's distribution of coffee to persons "unrelated to the Company" as a factor in the decision to terminate Santiago, despite citing it in his testimony as a reason for the discharge. As to the report itself, Sanchez initially testified on direct examination that he prepared it on his own initiative and had not been asked or requested by anyone to do so. However, in yet another demonstration of his inconsistent testimony, Sanchez changed his tune on cross-examination and admitted that the personnel office required that a report be prepared when such incidents occur, and that Velez had, in fact, asked him for a report of the incident. (Tr. 893; 907). Sanchez claims that in his 25 years with the Company, he has never had an incident occur where an individual took coffee from the Company and delivered it to nonemployees who were off company property. He further testified that at no time had he, or any other manager or supervisor in his presence, advised employees that they could take coffee from the coffee machine and distribute it to anyone outside of the facility. By the same token, however, Sanchez never claimed that he or any other supervisor or management personnel had ever told employees that they were forbidden from doing so, or that they would need supervisory permission before doing so.

Santiago testified that his distribution of coffee to nonemployees was neither improper nor unusual because he had personally observed nonemployee contractors who did business with the Respondent getting free coffee from the coffee machine during their visits to the Respondent's facility, and seen Respondent's own shipping department employees giving coffee to nonemployees. He admits, however, that those nonemployees he observed getting coffee did so while on Company premises, while the coffees he distributed to Torres and others occurred off Company premises. Nevertheless, he testified that, to his knowledge, the Respondent has no rule prohibiting the distribution of coffee to nonemployees, or regarding the use of the coffee-dispensing machine. (Tr. 399; 403).³⁰ Torres similarly testified to seeing nonemployees who did business with the Respondent get coffee from the Respondent's coffee

³⁰ The Respondent grossly mischaracterizes Santiago's testimony by claiming, on brief, that Santiago testified that "outsiders" or nonemployees who enter the Company's premises for business-related purposes and who obtain free coffee from the coffee machine "must have some type of authorization." Santiago's assertion that "some type of authorization" was needed by such "outsiders" was in response to a question by the Respondent's counsel on whether said outsiders needed permission to come onto company premises, not to whether they needed authorization to obtain coffee from Respondent's coffee machine. (See Tr. 497). Nor am I persuaded by the Respondent's further assertion, at p. 40, fn. 7 of its brief, that Santiago's remark to Torres, that he "was going to see if I could bring [the coffees] out," constituted an implicit admission by Santiago as to the impropriety of his conduct. While Santiago was not asked to explain what he meant by this latter remark to Torres, Santiago might very well have been referring to how he was going to handle the physical task of toting the 6 cups of coffee to Torres and the others.

machine, and that, to his knowledge, there were no rules limiting the amount of coffee an individual could get from the coffee machine, or as to who could use the machine. (Tr. 189).

I credit Santiago over Sanchez as to what was said at the May 29, 2003 meeting. Thus, I find that it was J.P. Velez, not Sanchez, who questioned Santiago about the coffees he gave to union supporters outside the facility 5 days earlier. Sanchez so stated in his June 6, 2003 memo to Velez regarding the incident, and further admitted as much, albeit somewhat ambiguously, on cross-examination. As already discussed, I further find that, as testified to by Santiago, J. P. Velez indeed asked Santiago why he had given coffees to nonemployees who were handing out union literature against the Company. J. P. Velez, as noted, was not called to either corroborate Sanchez' account or to refute Santiago's version of what transpired at the May 29, 2003 meeting. A party's failure to call a witness who may reasonably be assumed to be favorably disposed to the party justifies an adverse inference as to any factual question on which the witness is likely to have knowledge. *Woodlands Health Center*, 325 NLRB 351, 361 (1998). Such an inference is fully warranted here with respect to what J. P. Velez may have said to Santiago. I note in this regard that while Sanchez did provide an account of what he, Sanchez, said and did at that meeting, the latter never described what J. P. Velez asked or said to Santiago at that meeting. Santiago's account of what J. P. Velez said to him is, therefore, undisputed and credited.

I also credit Santiago's assertion that Sanchez told him he was tired of going around this "issue" without clarifying or explaining what issue he was referring to. Although Sanchez claims to have told Santiago during their meeting that the latter had changed his version of the coffee incident in a matter of 8 to 10 minutes, Sanchez was never asked to confirm or deny Santiago's claim that he, Sanchez, also made the "tired of going around this issue" remark. Further, as previously explained, the Respondent's attempt, on brief, to explain what Sanchez meant by his "going around the issue" is tantamount to an admission that Sanchez indeed made the "issue" remark attributed to him by Santiago. Accordingly, I find that Sanchez never actually informed Santiago that he was being dismissed "for removing Company property and giving it to people who were unrelated to the Company." Rather, Santiago's credited version makes clear that during this meeting, J. P. Velez simply asked Santiago why he had distributed coffee to nonemployees who were distributing union literature against the Company, that Santiago readily admitted doing so, and that after declining to prepare a written statement regarding the incident, Sanchez notified Santiago that he was tired of going around this "issue" and terminated him without any clear explanation.

Finally, I find, as testified to by Santiago and Torres, and as admitted by Perez, that the Respondent does not have any written rule or policy governing the use of the coffee machine, or any restriction on how much coffee employees are allowed to take. Nor does there appear to be a prohibition on employees getting coffee from the coffee machine to give to other employees. In this regard, Crespo's assertion that he believed Santiago was taking the cups of coffee to fellow employees, and presumably did not stop him for this reason, makes patently clear that no such prohibition exists. As to whether the Respondent

had any such prohibition on the distribution of coffee to non-employees, the only evidence that such a restriction existed came from Perez, who testified that supervisory or managerial approval was required before an employee could provide non-employees with coffee from the Respondent's coffee machine. However, neither Sanchez, who discharged Santiago, nor Crespo, who witnessed Santiago's coffee incident, testified to the existence of any such restriction. In fact, Perez' acknowledgment that the Respondent had no rules, written or otherwise, regarding the use of the coffee machine leads me to conclude that no written rule prohibiting the giving of coffee to nonemployees exists. Clearly, had such a rule existed, the Respondent undoubtedly would have produced it. Further, even if I were to believe Perez' assertion in this regard, no evidence was produced to show that employees were ever told or made aware of this restriction.

C. Discussion

1. The 8(a)(1) allegations

a. The July 2002, Cruz-DeJesus incidents

The complaint alleges, and counsel for the General Counsel contends, that the Respondent created an unlawful impression of surveillance when, on July 25, 2002, the day after the first employee meeting, DeJesus told Cruz he knew all about the meeting, and warned him to "be careful" because he "knew how the [Respondent] worked," and when, on July 31, 2002, the day after the second employee meeting, DeJesus called Cruz at home and questioned him about what had been discussed at, and who had attended, the meeting. While denying the above allegation in its answer, the Respondent on brief has offered no defense to the allegation and, as noted, did not call DeJesus as a witness to refute Cruz' claim of what the former told him on July 25 and 31, 2002. "The test for determining whether an employer engages in unlawful surveillance, or unlawfully creates the impression of surveillance, is an objective one and involves the determination of whether the employer's conduct, under the circumstances, was such as would tend to interfere with, restrain or coerce employees in the exercise of the rights guaranteed under Section 7 of the Act." *Martech Medical Products*, 331 NLRB 487, 500 (2000); *Parissippany Hotel Management Co.*, 319 NLRB 114, 125 (1995).

Cruz' attendance at the July 24 and 30 meetings, and the meetings themselves, clearly were protected activity under Section 7 of the Act as the purpose of the meetings was to discuss concerns employees had regarding their wages and other terms and conditions of employment, and the means by which said employee concerns should be presented to the Respondent. As to DeJesus' comments to Cruz expressing knowledge of both meetings, there is no indication from Cruz' credited account that DeJesus ever explained to Cruz how he learned of the meetings. DeJesus, as noted, was not called to either refute Cruz' claim or explain how he learned of the meetings. In the absence of any explanation having been provided to Cruz, the latter reasonably could have believed that the Respondent was spying on, and was fully aware of, his and other employees' organizational activities, and, given DeJesus' warning to Cruz "to be careful," that his continued involvement in organiza-

tional activities could have adverse consequences for him. By creating the impression, through DeJesus' remarks to Cruz on July 25 and 31, 2002, that its employees' organizational activities were being kept under surveillance, and by warning him that unspecified adverse consequences might result from engaging in such protected activity, the Respondent, I find, effectively interfered with, restrained, and coerced Cruz in the exercise of his Section 7 rights, and violated Section 8(a)(1) of the Act. *Seton Co.*, 332 NLRB 979, 981 (2000).

I further find that, in addition to creating an impression of surveillance, DeJesus' July 31, 2002 questioning of Cruz as to who had attended the employee meeting the night before and what was discussed amounted to an unlawful interrogation. In determining whether the questioning of an employee amounts to an unlawful interrogation, the Board applies a totality-of-the-circumstances test. *Rossmore House* 269 NLRB 1176 (1984); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).³¹ By asking Cruz to identify who had attended the meeting, DeJesus was, in effect, seeking to elicit information about the protected activities of other employees, conduct which has long been found to violate Section 8(a)(1) of the Act. *Observer & Eccentric Newspapers, Inc.*, 340 NLRB No. 18 (2003); *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1123 (2002); *Sumo Airlines*, 317 NLRB 383 (1995); *Cumberland Farms*, 307 NLRB 1479 (1992). Nothing in Cruz' credited description of what DeJesus said to him during their brief July 31, 2002 phone conversation suggests that the latter ever explained to Cruz why he was seeking or needed the information on the identity of employees in attendance or regarding the substance of what was discussed. This questioning of Cruz by his immediate supervisor, coming as it did just one week after DeJesus revealed that Cruz' and other employees' activities were being kept under surveillance and after Cruz was warned "to be careful," was clearly coercive. While DeJesus' questioning of Cruz occurred in a phone call made to the latter's home, the latter's refusal to provide DeJesus with the information requested suggests that the questioning was not merely social or incidental. Further, there is no evidence that Cruz was, at the time of DeJesus' interrogation, an open and active union supporter. See, e.g., *La Gloria Oil & Gas*, supra. Considering all the circumstances surrounding the July 31, 2002 incident, DeJesus' interrogation of Cruz was clearly coercive and unlawful, and violated Section 8(a)(1) of the Act. See *Rossmore House*, 269 NLRB 1176 (1984).

b. The August 13, 2002 Santiago-Rojas conversation

Relying on Santiago's testimony, counsel for the General Counsel contends that on August 13, 2002, the Respondent, through Rojas, unlawfully created an impression of surveillance by informing Santiago that it had learned of the July meetings from one of the salesmen who had been in attendance, and further threatened Santiago with reprisals by stating that it had

Santiago in its sights. However, as previously discussed, I have accepted Rojas' version of events as true and, consequently, find no merit to the above allegations. Accordingly, I shall recommend that these allegations be dismissed.

c. The August 13, 2002 surveillance by Respondent agents

The complaint alleges that the Respondent, through hired agents, Jorge Figueroa and E. Gonzales, engaged in unlawful surveillance of employees by photographing and/or videotaping them as they gathered near the Vega Alta Plaza on August 13, 2002 for a third employee meeting. As an initial matter, I credit Santiago's testimony that soon after arriving at the Vega Alta town plaza for the employee meeting, he observed J. Figueroa and E. Gonzales videotaping and taking pictures of him and other employees who were gathered there. Neither J. Figueroa nor E. Gonzales was called to refute his testimony in this regard. Further, A. Figueroa's testimony makes clear, and the Respondent concedes as much on brief (RB:3), that these individuals were there at the Respondent's behest.³²

The Respondent, as noted, contends that it hired Agents J. Figueroa and E. Gonzalez to lawfully surveil employees gathered for the August 13, 2002 meeting at the Vega Alta plaza for the sole purpose of determining "if persons involved in stealing merchandise from Holsum were present at the plaza." The Respondent's argument, in my view, borders on the absurd and is, I find, a pure fabrication. The Respondent, for example, produced no evidence to show that it had been having a problem with theft of its merchandise by employees or other individuals. Nor did it identify the type of merchandise that was allegedly being taken or who it suspected of engaging in such conduct. Indeed, the Respondent never claimed to have had any suspects in mind. There is likewise no indication that the Respondent filed any report with the local police department regarding these alleged thefts. If, as claimed by the Respondent, it was having a problem with employee theft of merchandise, one might reasonably expect the Respondent to have conducted an internal investigation into the matter, or reported the incident(s) to the local police. Other than A. Figueroa's testimony regarding the reason for the surveillance, no evidence, such as internal documents or police reports, was produced by the Respondent to show that it had been investigating or reporting to the police these alleged thefts at any time prior to August 13, 2002.

Figueroa, as noted, testified to being told by Joe Gonzalez that the surveillance work was aimed at identifying individuals who were allegedly engaged in stealing merchandise from the Respondent, and the invoice he submitted to Respondent for the work performed by Jorge Figueroa and E. Gonzalez describes the work as such. I found his testimony in this regard unconvincing. Rather, I am persuaded that either A. Figueroa was intentionally lied to by Joe Gonzalez so as to disguise the latter's true motivation for retaining A. Figueroa's firm to conduct

³¹ Among the factors considered by the Board in applying the "totality of circumstances" test are those set forth in *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964), commonly known as the "Bourne" factors. They include (1) the background under which the questioning occurred, (2) the nature of the information sought, (3) the identity of the questioner, (4) the place and method of interrogation, and (5) the truthfulness of the reply. *Id.* at 48.

³² Although the Respondent, in its answer, denied that J. Figueroa or E. Gonzales were its agents, on brief it admits that both were employed by Los Angeles Guardianes, and that it had retained the latter firm to investigate persons allegedly engaged in theft of Company merchandise. It further admits paying the firm for services conducted by the two at Vega Alta on August 13, 2002.

the surveillance of Respondent's employees, to wit, to identify those employees taking part in the organizational activities, or A. Figueroa and/or Joe Gonzalez concocted this explanation after J. Figueroa and E. Gonzalez were caught in the act of spying on employees' protected activities. As stated above, the Respondent produced no evidence to show that the theft of merchandise by employees had been a problem at any time before August 13, 2002. The one person who could have corroborated A. Figueroa on why the surveillance was conducted, or provided testimony or other evidence confirming that the theft of merchandise by employees had become a serious problem at Holsum warranting the surveillance, was Joe Gonzalez. Joe Gonzalez, however, was never called to testify, leading me to believe that had he been called, Joe Gonzalez would not have supported the Respondent's explanation for the surveillance.

Further, as previously discussed, A. Figueroa, while claiming that Joe Gonzalez told him why the surveillance was needed, was not privy to the conversation the latter had with Jorge Figueroa, the one who actually performed the surveillance work. Consequently, A. Figueroa could not have known what Joe Gonzalez may have told J. Figueroa regarding the specific nature of the surveillance work he was being asked to conduct. Thus, that A. Figueroa may not have given J. Figueroa different instructions from those which the former purportedly first received from Joe Gonzalez does not establish that J. Figueroa received the same instructions from Joe Gonzalez as to the nature of the work he was to perform. Nor do I believe A. Figueroa's claim that J. Figueroa aborted the August 13, 2002 surveillance of employees because the purported underlying reason for conducting the surveillance, e.g., the theft of Company merchandise, "was not happening there." Rather, the record makes clear that the surveillance was not voluntarily aborted, but rather was interrupted by the local police after J. Figueroa and E. Gonzalez were spotted by employees videotaping and taking pictures of them. I also find it unlikely that A. Figueroa, who billed the Respondent \$2000. for the surveillance work, would not know what happened to the single photograph taken that day. I also find it difficult to believe that given the amount of money paid by the Respondent for the surveillance work, it would not have received the photo in question or know of its whereabouts. In sum, I find that the purpose behind the surveillance of employees conducted by the Respondent's agents, J. Figueroa and E. Gonzalez, on August 13, 2002, was to photograph and thus help the Respondent identify which of its employees was taking part in the organizational drive. Accordingly, I find that the August 13, 2002 surveillance was indeed coercive and a violation of Section 8(a)(1) of the Act.

d. The September 2000 interrogation of Rodriguez

As noted, sometime in September 2002, Nieves asked Rodriguez if he had received a copy of Calderón's letter, solicited his views as to its contents, and, at one point during their discussion, also asked Rodriguez about his views on the meetings held by employees. As previously described, Company president Calderón's September 5, 2002 letter to employees contained, among other things, statements expressing Calderón's strong opposition to unions. Nieves, as indicated, was not

called to refute or explain the comments attributed to him by Rodriguez. Absent any legitimate explanation for Nieves' questioning of Rodriguez, one can reasonably infer, as I do here, that Nieves' intent in questioning Rodriguez on how he felt about Calderón's letter, and about the employee meetings, was to ascertain whether Rodriguez shared Calderón's anti-union views, or was a union sympathizer or supporter. Although Rodriguez conveyed to Nieves that he was not partial to unions, his query to Nieves on why the latter was asking him such questions convinces me that Rodriguez was not comfortable with, and may indeed have felt somewhat intimidated by, Nieves' questions. Considering all the circumstances surrounding the questioning of Rodriguez, e.g., that it was conducted by his immediate supervisor in the latter's office, that no legitimate reason was given for the interrogation, that Rodriguez found the questioning troublesome, and that no evidence was presented to show that Rodriguez was an active or known union supporter when questioned by Nieves, I find that Nieves' questioning of Rodriguez was indeed coercive and unlawful, and a violation of Section 8(a)(1) of the Act.

e. The September 14, 2002 interrogation of Torres

Like the above questioning by Nieves of Rodriguez, on September 14, 2002, Supervisor B. Torres, as discussed above, approached Torres as he was about to embark on his route and questioned him on whether he received Calderón's letter and how he felt about it. Torres, like Rodriguez, declined to express any opinion about the letter for fear of compromising himself. B. Torres, like Nieves, did not testify, leaving unexplained the motivation for the questioning. However, B. Torres' insistence that he needed to know how Torres felt about Calderón's letter convinces me that B. Torres was not simply engaging in idle chitchat with Torres, but may instead have been acting on directions from higher management, possibly Calderón himself, to help identify which employees were or were not union sympathizers. As with Nieves' questioning of Rodriguez, and for essentially the same reasons, I find that B. Torres' questioning of Torres on September 14, 2002, was coercive. The interrogation of Torres, as noted, occurred without warning as Torres was about to begin his route, and was conducted by his supervisor without any explanation as to its purpose. Torres' reluctance to tell B. Torres how he felt about Calderón's letter for fear of compromising himself reveals a concern by Torres that such a disclosure might have adverse consequences for him. There is no evidence to indicate that, at the time of the questioning, Torres was known to be an open and active union supporter. Considering all of the circumstances surrounding B. Torres' September 14, 2002 questioning of Torres, I find that said questioning amounted to an unlawful interrogation, in violation of Section 8(a)(1) of the Act.

f. The September 16, 2002 interrogation of Santiago

On September 16, 2002, 2 days after the unlawful interrogation of Torres, the Respondent, I find, engaged in a similar unlawful interrogation of Santiago. As found above, on that date, his immediate supervisor, Serrano, summoned Santiago to his office cubicle, asked Santiago if he had received Calderón's letter, and then told Santiago to put in writing what he thought

of the letter. Serrano's questioning of Santiago clearly was not part of any casual conversation the two were having that day. Rather, Santiago was summoned to Serrano's office to discuss some business-related matters after which Serrano changed the subject to the Calderón letter by asking Santiago if he had received a copy and what he thought of it. While Santiago, like Torres, was responsible for organizing the July and August employee meetings, there is no evidence that Santiago conducted his organizational activities in the open or that, when questioned by Serrano on September 16, 2002, Santiago was known to be an open and active union adherent.³³ As Serrano did not testify, the reason for his questioning of Santiago is unexplained. I am nevertheless convinced, given the unlawful interrogation of employees Rodriguez and Torres just days earlier, that Serrano's interest in questioning Santiago on how he felt about Calderón's antiunion letter was part and parcel of an overall plan by the Respondent to identify the union supporters and sympathizers in its midst. When the circumstances surrounding Serrano's questioning of Santiago are viewed in their totality, including the fact it was conducted by his supervisor, Serrano, at the latter's office, that it was unexpected and not part of any casual or friendly conversation, that it occurred in the context of other similar unlawful conduct, and that no explanation has been proffered for the questioning, a finding is warranted that the questioning was indeed coercive and unlawful.

The Respondent's assertion on brief (p. 34), that Serrano's questioning was not coercive because Santiago purportedly "showed no fear or feeling of coercion in the conversation with Serrano" and made no such claim in his testimony, does not warrant a different result, for the standard applied by the Board in determining whether certain conduct, including interrogations, violates Section 8(a)(1), is an objective one. *Westwood Health Care Center*, 330 NLRB 935, 940 at fn. 17 (2000). As explained by the Board in *Westwood*, supra, "To say that the standard is objective. . . means that it does not take into account either the motive of the employer or the actual impact on the employee." The totality of the circumstances surrounding Serrano's questioning of Santiago convinces me that such interrogation could reasonably be said to have interfered with the free exercise by Santiago of his Section 7 rights, and thus vio-

lated Section 8(a)(1) of the Act.

g. The May 6, 2003 threat directed at Santiago

As previously discussed, on May 6, 2003, just days after Torres was, as fully discussed infra, unlawfully discharged for his Union activities, Rojas approached Santiago and, after asking if the latter had heard of Torres' discharge, warned Santiago to be careful and to take care of his job because he was next. There is no indication in Santiago's credited account of this conversation that Rojas explained the reason for the warning. Although the Respondent has contended, albeit pretextually as found below, that Torres was discharged for violating its "no helper" policy, there is no evidence to indicate, nor does the Respondent claim, that Santiago had been engaging in similar violations of the "no helper" policy, which could have explained the threat of discharge directed at Santiago by Rojas. This unexplained threat to Santiago, following on the heels of Torres' discharge for his active involvement with the Union, was, I find, clearly intended to convey to Santiago the message that the Respondent suspected he too might be involved in union activities and would face a similar fate if he, like Torres, were found to be engaging in such activities.³⁴ Rojas' remark was clearly coercive as it could reasonably have the effect of causing Santiago to discontinue his activities on behalf of the Union for fear that he would be discharged if he did not. Rojas' threat to Santiago, therefore, constituted a violation of Section 8(a)(1) of the Act.

h. The May 9, 2003 interrogation of Montalvo

On May 9, 2003, Calderón, as previously noted, distributed another letter to employees, similar to the one he sent them in September 2002, in which he, among other things, expressed his belief that the USW was trying to organize employees, his opposition to the USW, and his expectation that employees would oppose USW's efforts. The complaint alleges, and I agree, that Supervisor Rivera's questioning of Montalvo as to what he thought of Calderón's May 2003 letter, and whether union representatives had phoned or visited him at his home, was unlawful. Rivera, as noted, never explained why he needed to know how Montalvo felt about Calderón's letter, or whether Montalvo had been contacted by phone or in person at his residence by a union representative. There is no evidence to indicate that Montalvo was, at the time of the questioning, a union supporter or sympathizer, much less an open and active one. The questioning, as noted, was conducted by Montalvo's supervisor during a work evaluation being performed by the latter of Montalvo, and was not part of any casual conversation between the two. Although Montalvo, when asked how he felt about Calderón's antiunion letter, told Rivera that he agreed with it, the fact that the question was posed to him by his supervisor during the course of an evaluation raises a doubt as to the reliability of his answer. Arguably, Montalvo may have

³³ As Santiago was among the group of employees gathered at the Vega Alta town plaza when the Respondent's agents unlawfully videotaped and/or photographed their activities, one can reasonably assume that the Respondent would have suspected from its surveillance that Santiago was taking part in the employees' organizational activities. Although the evidence does make clear that Santiago indeed was one of the principal organizers of such activity, there is no evidence that the Respondent knew of the extent of his involvement in the organizational drive. The Respondent admits as much when it asserts, on br. (p. 26), that no evidence has been produced to show "that Holsum had specific knowledge of Santiago's participation, much less his purported elevated role, in any of those activities." While I disagree with the Respondent's former assertion, given its unlawful surveillance of the August 13, 2002, employee gathering in Vega Alta at which Santiago was present, I am inclined to agree, given the lack of evidence showing otherwise, that the Respondent was unaware of the extent of Santiago's involvement in organizational activities when Serrano, on September 16, 2002, asked him for his views on the Calderón letter.

³⁴ As discussed above, the Respondent, by this time, suspected Santiago of being a union sympathizer, having gained that suspicion by virtue of the unlawful surveillance of the August 13, 2002 employee meeting at the Vega Alta town plaza attended by Santiago. I do not, however, believe that the Respondent was yet fully aware of the extent of his involvement with the Union.

feared retaliation in the form of a bad evaluation and simply gave Rivera the answer he wanted to hear. Whether or not Montalvo actually felt coerced by Rivera's questioning is, in any event, of no real consequence for, as previously discussed, the test for determining when an interrogation is coercive is an objective one based not on whether the recipient actually feels coerced, but rather whether the questioning could reasonably tend to coerce the recipient into employee at whom it is directed. *Westwood Health Center*, supra. The totality of circumstances surrounding the questioning of Montalvo, e.g., that it was conducted by a supervisor during an evaluation of Montalvo, without explanation as to why the information sought (his views on Calderón's antiunion letter, whether he had received a phone call or a visit from union representatives) was needed, warrants a conclusion that Rivera's interrogation of Montalvo in May 2003, was indeed coercive. Accordingly, I find that said interrogation violated Section 8(a)(1) of the Act.

i. The mid-May 2003 interrogation of Santiago

The complaint alleges, and I agree, that J. P. Velez' questioning of Santiago on how he felt about Calderón's May 2003 antiunion letter, and how he felt about unions in general, was unlawful. J. P. Velez, as noted, did not testify, leaving unexplained his reason for soliciting Santiago's views on Calderón's antiunion letter and about unions in general. There is no question that, as found above (see discussion of Rojas' May 6, 2003 discharge threat to Santiago), the Respondent had reason to believe that Santiago was a union sympathizer, hence the threat directed at him by Rojas. In the absence of any explanation from J. P. Velez as to the reason for his inquiry, I am convinced that J. P. Velez' purpose in questioning Santiago was to determine the extent of Santiago's involvement with the Union. J. P. Velez would not have any reason to posit such questions to Santiago if he, in fact, knew that Santiago, like Torres, was one of the Union's primary in-house organizers at Holsum. In light of all the circumstances, including the fact that Santiago had already been threatened with discharge days earlier by Rojas, I find that J. P. Velez' interrogation of Santiago was indeed coercive and a violation of Section 8(a)(1) of the Act.

2. The 8(a)(3) allegations

a. Torres' discharge

The complaint, as noted, alleges that the Respondent unlawfully discharged Torres on May 1, 2003, for his union activities. The Respondent denies the allegation, contending instead that Torres was lawfully discharged for violating its rule prohibiting drivers from carrying unauthorized passengers in a Company vehicle. To establish a violation of Section 8(a)(3) and (1), the General Counsel, under the causation test set forth by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), must first make a prima facie showing sufficient to support an inference that protected or union activity was a motivating factor in an employer's decision to discipline or discharge an employee. See, *Manno Electric*, 321 NLRB 278 fn. 12 (1996). The General Counsel makes out a prima facie case by demonstrating, through a preponderance of evidence, that the alleged discriminatee engaged in union or other protected activity, that the em-

ployer was aware of that activity, and that it harbored antiunion animus. Inferences of knowledge, animus, and discriminatory motivation may be drawn from circumstantial as well as direct evidence. *Frierson Building Supply Co.*, 328 NLRB 1023 (1999). Once the General Counsel succeeds in establishing a prima facie case, the burden shifts to the employer to demonstrate that it would have taken the same action even if the employee had not engaged in any protected or union activity.

Torres' involvement in union and/or protected activities is fairly well-established, for the record makes clear that Torres, along with Santiago, was responsible for arranging the employee meetings that were held in 2002, and who, with Santiago, met with union organizers to discuss organizing the salespersons. Torres also attended various union meetings and solicited signed authorization cards from numerous employees. Given these undisputed facts, there is no question, and I so find, that Torres was, at all times prior to his discharge, an active union adherent. Evidence that the Respondent harbored antiunion animus is apparent from its unlawful conduct in interrogating employees about their activities, creating the impression that it was keeping their activities under surveillance, and using hired agents to photograph and/or videotape employees attending the September 2002 employee meeting. Calderón's September 2002, and May 2003 antiunion letters to employees, while not alleged to be unlawful, nevertheless provide ample proof of the Respondent's hostility towards the Union and its supporters.

As to whether the Respondent had knowledge or was aware of Torres' union activities before firing him, there is little direct evidence establishing such knowledge.³⁵ The inquiry, however, does not end there for the Board has made clear that where no direct evidence of employer knowledge exists, it will examine all the circumstances to determine if employer knowledge of the employee's union activities can be inferred. *Music Express East, Inc.*, 340 NLRB No. 129 (2003).

I find such an inference warranted here. There is, in my view, sufficient reason to doubt the Respondent's assertion that it was unaware of Torres' involvement with the union prior to discharging him on May 1, 2003. Torres, for example, testified, credibly and without contradiction, that in April 2003, just prior to being discharged, he conducted his union activities, including his solicitation and distribution of union cards to other employees, out in the open in the Respondent's parking lot, in plain view of those entering or leaving the Respondent's facility. His activities, therefore, could very well have been observed by any number of supervisors and managers who entered or left the Respondent's premises via the parking lot, including Human Resources Manager Velez who, as noted, was seen by Torres sitting in his vehicle for some 15 minutes near the guard house adjacent to the parking lot where Torres was conducting his Union activities. Velez, as noted, did not deny Torres' assertion and, more importantly, did not explain what

³⁵ Counsel for the General Counsel points to the comments Santiago claims Rojas made to him on August 13, 2002, in which Rojas admitted knowing that Torres and Santiago had organized and attended the employee meetings held in July 2002, as establishing proof of Respondent's knowledge.

he was doing sitting in his car all that time. In the absence of such an explanation from Velez, I find it more likely than not that Velez may very well have been observing Torres' activities.

Indeed, there is good reason to believe that the Respondent was on the lookout for any such union activities by employees. Thus, according to Calderón's May 9, 2003 antiunion letter to salesmen and their families, the Respondent had recently learned that a union was still trying to organize its employees or, as Calderón put it in his letter, "continu[ing] to threaten the future and security of the Holsum families." Perceiving this ongoing union activity as a threat to its existence, I am convinced that the Respondent, as it did during the July-September 2002, surge in union activity among its employees, would have attempted to learn through a closer observation of its employees' activities and through interrogations, as occurred with the May 2003, interrogations of Montalvo and Santiago, which employees were union supporters and which were not. Given the open manner in which Torres conducted his organizational activities in April 2003, and the Respondent's renewed awareness of and sensitivity to the union activity taking place among its employees, it would not be wholly unreasonable to believe that Torres' activities would have come to the Respondent's attention.

Other factors supporting an inference of knowledge include the timing of, and the false reason provided for, Torres' discharge. As to the former, Torres, as noted, was discharged around the time that the Respondent, as made clear by Calderón's May 9, 2003 memo, discovered and became preoccupied with the renewed organizational activity being undertaken at its facility, and soon after Torres openly began conducting his union activities in the Respondent's parking lot. As to the latter, the Respondent's explanation, that it fired Torres pursuant to a "one strike, you're out" rule used for violations of the "no helper" policy, is devoid of merit, for, as previously discussed, no credible evidence was produced by the Respondent to show that it ever had a "one strike, you're out" rule. In fact, the only credible evidence produced on how employees had been, or were expected to be, treated for violating the "no helper" policy reveals just the opposite. Thus, Vega, as previously discussed, was never seriously disciplined, much less discharged, for his violation of the policy, and received only a cautionary verbal warning from Perez for his misconduct. Further, the supervisors' memos contained in Respondent's Exhibits 22, as noted, reflect that employees were told only that they *could* be disciplined or suspended, not necessarily discharged, if caught violating the "no helper" policy. Indeed, the lenient treatment accorded Vega for violating the "no helper" policy is consistent with the type of punishment, e.g., warnings, suspensions, that sales supervisors in 1995 told employees they could expect to receive for future violations of the "no helper" policy (see RX-22). In sum, the Respondent's implicit assertion that it maintained a "zero tolerance" policy or, as described in its brief, a "one strike, you're out" rule, for violators of the "no helper" policy, is contrary to the weight of the evidence and, in my view, patently false. An employer's proffer of a false rationale for an employment decision permits the Board to infer that the employer's actual reason is an unlawful one which it

seeks to conceal. *Waste Management of Puerto Rico v. NLRB*, 359 F.3d 36 (1st Cir. 2004). Thus, despite the lack of direct evidence of employer knowledge, the above-described circumstances surrounding Torres' discharge leads me to conclude that the Respondent was indeed cognizant of Torres' union activities when it discharged him on May 1, 2003. Rojas' unexplained and rather cryptic warning to Santiago on May 6, 2003, just days after Torres' discharge, that he, Santiago, was next to be discharged, bolsters the inference that the Respondent must have known of Torres' union activities and fired him for that reason. Accordingly, I find that counsel for the General Counsel has made a prima facie showing that Torres was unlawfully discharged, if not wholly at least in part, for his union activities.

I further find that the Respondent has not demonstrated that it would have discharged Torres even if he had not engaged in union activities. While there is no question that Torres was seen with an unauthorized person in his company vehicle, it is not all that clear that this particular incident amounted to a violation of the "no helper" policy as the unknown individual, according to Torres' undisputed account and which I credit, boarded his vehicle without permission and was not being used as a "helper" by Torres. But even assuming, arguendo, that Torres' decision to proceed to the next traffic light with the unauthorized person in his Company vehicle constituted a violation of the "no helper" policy, the mild treatment (a verbal warning) accorded Vega for a similar violation, the supervisors' memos in Respondent's Exhibit 22 showing employees being told only that they could receive warnings or suspensions for violating the "no helper" policy, and the Respondent's failure to present any credible evidence that employees had, in the past, been immediately terminated for a first time violation of the "no helper" policy, leads me to conclude that Torres would not have been discharged for his misconduct, which was his first offense of this kind. Rather, I am convinced that Torres, at most, would only have received either a warning or a suspension for this first time violation of the "no helper" policy, and that the Respondent's decision to impose the harshest punishment of discharge on Torres for this single violation of the "no helper" policy was precipitated by its discovery of his involvement with the Union and its antiunion animus. Thus, I find that, but for his union activities, Torres would not have been discharged, but would, at most, have received some lesser form of discipline. Accordingly, having found that Torres' discharge was motivated by antiunion reasons, it follows that the discharge violated Section 8(a)(3) and (1) of the Act, as alleged.

b. Santiago's discharge

As to Santiago's dismissal on May 29, 2003, counsel for the General Counsel has, I find, made a prima facie showing under Wright Line, supra, that his discharge was motivated by antiunion considerations. As previously discussed, Santiago, along with Torres, was responsible for organizing the three 2002 employee meetings, and for seeking out and soliciting the Union's assistance in organizing the Respondent's salesmen. Santiago also attended union meetings, and distributed and solicited signed union authorization cards from employees. Counsel for the General Counsel has also demonstrated,

through Santiago's unchallenged and credited testimony, that J.P. Velez, and thus the Respondent, learned of the extent of Santiago's involvement with the Union in mid-May, 2003, not long before discharging him.³⁶ Finally, as discussed above in connection with Torres' discharge, there is ample record evidence, including the numerous acts of misconduct committed by the Respondent in violation of Section 8(a)(1), showing that the Respondent harbored antiunion animus. As counsel for the General Counsel has made a prima facie showing that the Santiago's discharge was discriminatorily motivated by anti-union considerations, the burden shifts to the Respondent to demonstrate that Santiago's discharge would have occurred even if he had not engaged in union activity. The Respondent, I find, has not done so here.

While there is no disputing that Santiago, on May 24, 2003, took 6 cups of coffee from the Respondent's coffee machine and gave them to Torres and other union agents and/or supporters who were distributing union literature outside the Respondent's property, the mixed explanations proffered by Respondent's various witnesses for why this particular conduct was so improper as to warrant Santiago's discharge, along with other factors, convinces me that the coffee incident was simply used by the Respondent as a pretext to discharge Santiago for his union activities. As to why Santiago was discharged, the sole reason stated on the personnel action form presumably prepared soon after the action was taken is that Santiago was discharged for removing Company property from Holsum's premises without prior authorization. At the hearing, however, both Sanchez and Perez cited the distribution of the coffees by Santiago to nonemployees as a further justification for the discharge. Thus, Sanchez, as noted, testified that Santiago was fired for (1) "removing Company property" and (2) "giving it to people who were unrelated to the Company," while Perez testified that Santiago was fired for taking the coffees "outside of the Company" and distributing them "to some people that

were not part of . . . or foreign to Holsum." This additional reason for the discharge, i.e., the distribution of coffees to non-employees, was, as noted, not cited as a factor by the Respondent in the personnel action form prepared contemporaneously with the discharge. The Board has held that shifting defenses, such as those proffered here by the Respondent, support an inference that the Respondent's defense is a pretext. *Enjo Architectural Millwork*, 340 NLRB No. 162 (2003); *Tracer Protection Services*, 328 NLRB 734 (1999); *Black Entertainment Television*, 324 NLRB 1161 (1997).

The Respondent also did not provide Santiago with an explanation for his discharge when it fired him on May 29, 2003, for, according to Santiago's credited account, the only criticism of the May 24, 2003 coffee incident came from J. P. Velez whose primary and sole objection to Santiago's behavior was the fact that Santiago distributed coffees to union supporters or sympathizers who were handing out what he perceived to be anti-Holsum union literature. As noted, Sanchez, who notified Santiago of his discharge, simply told Santiago that he was tired of going around the "issue" without explaining what he meant, and made no mention to Santiago of his failure to obtain permission before taking the coffees off the premises, the sole reason stated in the personnel action form as the basis for the discharge, or that he had given the coffees to nonemployees, the other reason proffered for the discharge by Sanchez and Perez for the first time at the hearing. Sanchez' failure to explain to Santiago why he was being discharged lends further support to a finding that the reason(s) cited by the Respondent are purely pretextual and not the real reason(s) for his termination. *M.J. Mechanical Services*, 324 NLRB 812, 817 (1997); *Hudson Neckware, Inc.*, 302 NLRB 93, 94-95 (1991). Sanchez' failure to explain to Santiago what "issue" he was referring to, coupled with J.P. Velez' earlier criticism of Santiago's conduct in distributing coffees to union supporters handing out what he perceived to be anti-Holsum union literature, and the Respondent's attempt through Sanchez and Perez at the hearing to further rationalize its discharge decision by relying on a reason not previously cited in the personnel action report or discussed with Santiago, leads me to conclude that it was the fact that Santiago provided assistance to union supporters and sympathizers who were leafleting just outside the Respondent's property, not his alleged failure to get supervisory permission to leave the premises with the coffees, or to seek prior approval to hand out the coffees to nonemployees, which riled Sanchez and prompted him to discharge Santiago.

Thus, even if I were to believe, and I do not, that the standards of conduct rule cited by the Respondent as the reason for Santiago's discharge prohibited Santiago's conduct,³⁷ I am

³⁶ J. P. Velez, as noted, was not called to refute Santiago's claim that J. P. Velez interrogated him about his union activities and that, during that conversation, Santiago admitted being a union organizer. The Board ordinarily imputes a supervisor's knowledge of an employee's union activities to the employer, unless it is affirmatively established that the supervisor who obtained such knowledge did not pass the information on to others. *Ready Mixed Concrete Co.*, 317 NLRB 1140, 1146 at fn. 18 (1995); *C & L Systems Corp.*, 299 NLRB 366, 378 (1990). No such showing has been made here by the Respondent. As previously discussed and found, the Respondent, prior to J. P. Velez' mid-May 2003 interrogation, had reason to suspect that Santiago sympathized with the Union, but did not know of the extent of his union involvement. Thus, on May 6, 2003, Rojas warned Santiago to be careful lest he face the same fate that befell Torres for the latter's involvement with the Union. When questioned by J. P. Velez in mid-May about his views on Calderón's letter and of unions in general, Santiago, given Rojas' earlier threat, reasonably believed that the Respondent knew of his involvement with the Union, hence his reply to J. P. Velez that the latter knew full well that he (Santiago) had been one of the organizers of the employee meetings held in July 2002, and, given the opportunity, would do so again. Clearly, any questions or doubts the Respondent may have had regarding Santiago's involvement with the Union and in the 2002 organizational campaign were erased by Santiago's unwitting confession to J. P. Velez of his role as an active union adherent.

³⁷ Undermining the Respondent's claim that Santiago's distribution of coffee to nonemployees without prior authorization violated its Standards of Conduct rule is Perez' admission that the Respondent does not have any written rules regarding employee use of the coffee machine. Although Perez did testify that employees must obtain supervisory approval before distributing coffee to nonemployees on or off Company premises, he cited no specific rule containing such a restriction, and stated only, somewhat vaguely, that the Respondent does have a policy regarding its "products and property." He did not, as noted, describe or explain what that policy was. Perez' testimony as to the

nevertheless convinced that the Respondent simply used the rule as a pretext to justify discharging Santiago for lending support to the Union. Having found the Respondent's stated explanation for discharging Santiago to be pretextual, it follows that the Respondent has not satisfied its Wright Line obligation of showing that Santiago would have been discharged even if he had not engaged in union activity. Its discharge of Santiago is therefore found to have been unlawful and a violation of Section 8(a)(3) and (1) of the Act, as alleged.

CONCLUSIONS OF LAW

1. The Respondent, Holsum de Puerto Rico, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union, United Automobile, Aerospace, and Agricultural Implement Workers of America International Union, Local 2429, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. By creating the impression that it was keeping its employees union activities under surveillance, coercively interrogating them about their union activities, and warning employees of unspecified adverse consequences if they supported the Union, the Respondent violated Section 8(a)(1) of the Act.
4. By terminating the employment of José Torres Figueroa on May 1, 2003, and José Santiago Maldonado on May 29, 2003, because they supported the Union, the Respondent violated Section 8(a)(3) and (1) of the Act.
5. The above unlawful conduct engaged in by the Respondent constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
6. Other than the above-described unlawful conduct, the Respondent has not violated the Act in any other manner.

existence of such a restriction, when viewed in light of his admission that the Respondent has no rules governing the use of the coffee machine, is, like much of his other testimony, found not to be credible. Crespo, as previously discussed, made no mention in his testimony of the existence of any such rule. Rather, his testimony was that employees needed to get permission from a supervisor only when taking coffee off Company premises without regard to whether the coffee was to be given to employees or nonemployees. Sanchez likewise never claimed to have been relying on any particular rule when he asserted, for the first time at the hearing, that Santiago was discharged, in part, for distributing coffee to nonemployees without permission. In sum, there is no credible evidence to support the Respondent's claim that a supervisor's prior approval was needed before an employee could give a non-employee coffee from its coffee machine. Moreover, even if I were to accept as true, and I do not, Perez' claim that employees are required to obtain such prior supervisory approval, no evidence was produced by the Respondent to show that employees were ever made aware of this particular restriction on their use of the coffee machine. The Respondent's implicit assertion on brief, that Santiago admitted knowing of this particular restriction, is misleading and based on a distortion of Santiago's testimony, for the latter only admitted receiving a copy of the Standards of Conduct some 13 years earlier, and overhearing in conversations with more senior employees that employees were not permitted "to damage, remove, or use Company property without proper authorization." (Tr. 486-487). Santiago never admitted having knowledge of the rule described by Perez requiring prior authorization before coffees could be given to nonemployees.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

To remedy its unlawful discharge of employees Jose Torres Figueroa and Jose Santiago Maldonado, the Respondent, within 14 days of the Order, shall be required to offer them immediate and full reinstatement to their former positions or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. The Respondent shall also be required to make Torres and Santiago whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, the Respondent, within 14 days from the date of the Order, shall be required to remove from its files any reference to the unlawful discharge of Torres and Santiago, and, within 3 days thereafter, to notify them in writing that it has done so and that the discharges will not be used against them in any way. Finally, the Respondent shall be required to post an appropriate notice to employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁸

ORDER

The Respondent, Holsum de Puerto Rico, Inc., Toa Baja, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Discharging or otherwise discriminating against Jose Torres Figueroa, Jose Santiago Maldonado, or any other employee for supporting the Union.
 - (b) Engaging in the surveillance of its employees' protected activities, creating the impression that it is keeping its employees' activities under surveillance, coercively interrogating employees about their union activities, and threatening employees with discharge or other unspecified reprisals if they supported the Union.
 - (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Within 14 days from the date of the Board's Order, offer Jose Torres Figueroa and Jose Santiago Maldonado full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.
 - (b) Make Jose Torres Figueroa and Jose Santiago Maldonado whole for any loss of earnings and other benefits

³⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

suffered as a result of the discrimination against them in the manner set forth in the remedy section of the Decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify Jose Torres Figueroa and Jose Santiago Maldonado, in writing, that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Toa Baja, Puerto Rico copies of the attached Notice marked "Appendix."³⁹ Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by the Respondent at any time since July 25, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 10, 2004

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

³⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against any of you for supporting United Automobile, Aerospace, and Agricultural Implement Workers of America International Union, Local 2429, AFL-CIO, or any other union.

WE WILL NOT engage in, nor create the impression that we are engaging in, the surveillance of your protected activities, WE WILL NOT coercively interrogate you about such activities, and WE WILL NOT threaten you with discharge or unspecified reprisals for engaging in protected or union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Jose Torres Figueroa and Jose Santiago Maldonado full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Jose Torres Figueroa and Jose Santiago Maldonado whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Jose Torres Figueroa and Jose Santiago Maldonado, and WE WILL, within 3 days thereafter, notify both of them in writing that this has been done and that the discharges will not be used against them in any way.

HOLSUM DE PUERTO RICO, INC.